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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O.CJ. and P. Venugopal, J.*

His Holiness Chitramuthu Adigal Athma Santhi Nilayam, Pannaikulam Post, Ramanathapuram District .. *Appellant**

v.

The District Collector, Ramanathapuram District at Madurai, Madurai and another .. *Respondents.*

Cinematography Rules, rules 103 *and* 109 (1) (a)—*Application for no objection certificate—Opposition by petitioner — Allegation of touring cinema being within* 200 *metres from the petitioner's institution, a place of public worship — Objection overruled — 'No Objection Certificate' granted—Renewal of licence—Objection to renewal by petitioner—Objection overruled — Order granting renewal of licence, whether liable to be cancelled.*

Held, that the consideration of the licensing authority under rule 103 of the Cinematography Rules arises at the time of grant of licence and not at the time of renewal of licence. So the objection relating to the distance as an objection can be considered only at the time of grant of licence and not at the time of renewal. Rule 109 is an enabling provision, empowering the licensing authority to consider whether the site and the building conform to the relevant rules. It cannot give *locus standi* to the appellant to file objection for consideration by the licensing authority. At the time of the grant of 'No Objection Certificate', the appellant had filed the very same objection that the site of the travelling cinema was within the prohibited distance of the institution alleged to be a place of public worship, and the licensing authority, after considering the objection by the appellant granted the "No Objection Certificate" to the second respondent. Against the grant of 'No Objection Certificate' the appellant had not filed any appeal as provided under the rules, and the "No Objection Certificate" granted had now become final and conclusive. The appellant cannot again be permitted to raise the very same objection at the renewal stage. There is no provision under the Act or the Rules for calling for objections from the public in respect of an application for renewal of a licence by a person who holds a valid "No Objection Certificate". [*Para.* 3.]

Appeal under clause 15 of the letters patent against the order of Justice Padmanabhan, dated 22nd April, 1981, and made in the exercise of the Special Original Jurisdiction of the High Court in W. P. No. 278 of 1981 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the first respondent herein, relating to his order dated 2nd January, 1981, and made in R.O.C., C-1|160305 and quash the same.

M. R. Narayanaswami for *S. M. Abdul Wahab, M. Swamikkannu* and *Sherfudeen,* for Appellant.

The Court made the following

ORDER.—The writ petitioner is the appellant before this Court. The second respondent applied for a "No Objection Certificate" in 1978 for running a touring cinema. The appellant filed objections stating that his institution Athma Santhi Nilayam is a place of public worship and the situs of the touring cinema is within a distance of 200 metres from his institution. The objections

*W. A. No. 239 of 1981 in W. P. No. 278 of 1981. 30*th April,* 1981.

were overruled and a no objection certificate was granted in favour of the second respondent, on 13th August, 1978. Thereafter the licence was renewed at the instance of the second respondent and the latest order of renewal was passed on 4th January, 1981, renewing the licence upto 31st January, 1981. The appellant filed objections to the grant of renewal of licence similar to those which he raised at the time of grant of no objection certificate. Overruling the objection the first respondent renewed the licence in favour of the second respondent, observing that it is open to the appellant to agitate the same before some other forum, other than the licensing authority. Against this order, the appellant filed a writ petition and that was dismissed by a learned single Judge of this Court, holding that there is no provision under the Act or the rules entitling the appellant to prefer objections at the time of renewal of the licence and as the objection of the appellant was considered at the time of grant of "No Objection Certificate", it is needless for the licensing authority to consider the very same objection at the time of renewal of licence. Aggrieved against the order passed by the learned single Judge, the present writ appeal has been filed before this Court.

2. The learned counsel for the appellant contended that even where a licence is renewed, it is obligatory on the part of the licensing authority under rule 109 (1) (*a*) to satisfy itself that the building and the site conform to the relevant rules and the relevant rule 103 provides that the travelling cinema should not be located within a distance of 201 metres from a temple, and as the appellant's Athma Santhi Nilayam is a place of public worship situated within a distance of 200 metres from the situs of the touring cinema, the licensing authority should consider the objections of the appellant to satisfy itself at the time of renewal of the licence that the site in question conformed to the relevant rule *viz*., 103.

3. The consideration by the licensing authority under rule 103 arises at the time of grant of licence and not at the time of renewal of licence. So the objection relating to the distance is an objection that can be considered only at the time of grant of licence and not at the time of renewal. Rule 109 has an enabling provision empowering the licensing authority to consider whether the site and the building conform to the relevant rules. It cannot give *locus standi* to the appellant to file objection for consideration by the licensing authority. At the time of grant of "No Ojection Certificate" the appellant has filed the very same objection that the site of the travelling cinema is within the prohibited distance of his institution, alleged to be a place of public worship, and the licensing authority, after considering the objection by the appellant, granted the "No Objection Certificate" to the second respondent. Against the grant of "No Objection Certificate", the appellant has not filed any appeal as provided under the rules, and the "No Objection Certificate" granted has now become final and conclusive. The appellant cannot again be permitted to raise the very same objection at the renewal stage. There is no provision under the Act or the Rules for calling for objections from the public in respect of an application for renewal of a licence by a person who holds a valid "No Objection Certificate". The learned single Judge was, therefore, fully justified is coming to the conclusion that the appellant has no *locus standi* to prefer any objections to the grant of renewal of licence to the second respondent. We, therefore see no reason to entertain the writ appeal and it accordingly stands dismissed.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O.CJ.*

S. Rajalakshmi .. *Petitioner**

v.

D. Satyamurthy and another .. *Respondents.*

Tamil Nadu City Civil Courts Act (VII of 1892), section 4 and Civil Procedure Code (V of 1908), section 24—Suit for recovery of jewels by wife against husband in the Sixth Assistant City Civil Court—Petition by husband against wife for divorce in the Sixth Additional City Civil Court — Husband's petition before Principal Judge, City Civil Court praying for transfer of suit to be tried along with the petition for divorce—Transfer ordered—Powers of Principal Judge to order transfer.

In view of section 4 (3) of the Madras City Civil Courts Act, the Principal Judge of the City Civil Court is vested with the powers to make such arrangements as he may think fit for the distribution of the business of the Court among the various Judges thereof. Having withdrawn the wife's suit for recovery of jewels and past and future maintenance in the exercise of the power vested in him from the Sixth Assistant City Civil Judge, the Principal Judge has ample powers to make such arrangement as he may think fit for the distribution of the case and under this provision, there is absolutely no bar for the Principal Judge, to transfer the case to the Sixth Additional City Civil Judge in order that the same may be tried along with the original petition filed by the husband-first respondent. There is no illegality or want of jurisdiction in the order passed by the lower Court. [*Para.* 3.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal Judge, City Civil Court, Madras, dated 26th September, 1981 and made in C.M.P. No. 914 of 1981 in O.P. No. 285 of 1981.

D. C. Krishnamurthy, for Petitioner.

The Court made the following

ORDER.—The petitioner herein filed O.S. No. 2693 of 1981, on the file of the Sixth Assistant City Civil Judge, Madras, for recovery of certain jewels and also for the past and future maintenance. The petitioner herein is the wife of the first respondent herein. The first respondent has also filed O.P. No. 285 of 1981, on the file of the Sixth Additional City Civil Judge, Madras for a decree of divorce on the ground of desertion. C.M.P. No. 914 of 1981, was filed by the first respondent herein before the Principal City Civil Judge, Madras, praying for the transfer of the suit pending before the Sixth Assistant City Civil Judge, Madras, to the file of the Sixth Additional City Civil Judge, Madras, to be tried along with O.P. No. 285 of 1981. The Principal Judge, City Civil Court, Madras, on the facts and circumstances of this case, ordered the transfer as prayed for. It is against this order, the petitioner who is the wife of the first respondent herein, has filed this civil revision petition.

2. Mr. D. C. Krishnamurthy, learned counsel appearing for the petitioner submits that the Principal Judge, City Civil Court, Madras, has no power to effect such a transfer. According to the learned counsel, the Sixth Additional Judge, City Civil Court, Madras, is not subordinate to the Court of the Principal Judge, City Civil Court, Madras, and as such the transfer cannot be effected. Further, the learned counsel submits that as per the Madras City Civil Court Act, there is no power to effect such a transfer by the Principal Judge, City Civil Court, Madras. It has been further stated that the Original Petition was filed in the Court which has the matrimonial jurisdiction and as such the transfer of that petition to the file of the Sixth Additional Judge, City Civil Court, Madras, to be tried along with the suit filed by the petitioner herein cannot be entertained.

3. I have carefully considered the submissions made by the learned counsel appearing for the petitioner. Section 24 of the Code of Civil Procedure gives the general power of transfer and withdrawal. The Court of the Sixth Assistant City Civil Judge, is definitely

*C.R.P.No. 3504 of 1981.

5th November, 1981.

a Subordinate Court to the Court of the Principal City Civil Judge, Madras. It is from this Court the suit has been withdrawn. Hence, there is no difficulty in coming to the conclusion that the Principal City Civil Judge has the power to withdraw the suit from the Sixth Assistant City Civil Judge, Madras, under section 24, Civil Procedure Code. Even under the Madras City Civil Court Act, section 4, states:

"4. (1) The City Court shall consist of a Principal Judge and such number of Judges as the State Government may from time to time appoint.

(2) Subject to the provisions of section 15 each of the Judges may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force.

(3) The Principal Judge may from time to time make such arrangements as he may think fit for the distribution of the business of the Court among the various Judges thereof."

In view of section 4 (3) of the Madras City Civil Court Act, the Principal Judge is vested with the powers to make such arrangements as he may think fit for the distribution of the business of the Court among various Judges thereof. Having withdrawn the suit in view of the power vested with him from the Sixth Assistant Judge, City Civil Court, Madras, the Principal Judge has ample powers to make such arrangements as he may think fit for the distribution of the cases and under this provision, there is absolutely no bar for the Principal Judge, City Civil Court, Madras, to distribute this work to the VI Additional City Civil Judge, Madras, in order that the same may be tried along with the original petition filed by the first respondent. I do not find any illegality or want of jurisdiction in the order passed by the lower Court.

4. In these circumstances, I do not find any question of jurisdiction as such involved in this revision for me to admit the same. Hence, the revision petition is dismissed.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and S. Swamikkannu, JJ.*

Krishnan and another .. *Petitioners**

v.

Krishnamurthy and others .. *Respondents.*

Civil Procedure Code (V of 1908), sections 10 and 151—Suit for possession in pursuance of an agreement of sale—Defendants claiming to be cultivating tenants—Application by defendants before Record Officer under Tamil Nadu Agricultural Tenants Record of Tenancy Rights Act (X of 1969)—Defendants applying for stay of trial of suit—Jurisdiction of the civil Court to grant stay under inherent powers.

Held: The civil Court has jurisdiction to stay the trial of a suit pending before it invoking its inherent powers under section 151, Civil Procedure Code, during the pendency of a proceeding by the tenants before the Record Officer under the Tamil Nadu Agricultural Tenants Record of Tenancy Rights Act (X of 1969), but the exercise of such power would depend on the facts and circumstances in each case and on this finding whether the ends of justice called for such a stay or in order to prevent the abuse of process of the Court, the stay could be granted. [*Para.* 18.]

Cases referred to:—

Rayappan v. *Sri Patteswaraswami Devasthanam,* (1978) 91 L.W. 459: (1977) T.L.N.J. 87; *Nainsing* v. *Koonwarjee,* (1971) 1 S.C.J. 252: (1971) 1 S.C.R. 207: A.I.R. 1970 S.C. 997; *Arjun Singh* v. *S. Mohindra Kumar,* (1964) 5 S.C.R. 946: A.I.R. 1964 S.C. 993; *Kazimar Peria Pallivasal* v. *Arumugham,* (1975) T.L.N.J. 32; *Sri Koppanaicken Patti Muthalammal Temple* v. *Marammal,* (1974) T.L.N.J. 113; *Muniyandi* v. *Rajangam Iyer,* (1976) 1 M.L.J. 344; *Aravan Servai* v. *Kamugan Servai,* (1958) 2 M.L.J. 505: (1958) L.W. 532; *Balaji Rao* v. *Natesa Chetty,* (1947)

* C.R.P.No. 1343 of 1979.

23rd July, 1981.

1 M.L.J. 330: 60 L.W. 276: A.I.R. 1948 Mad. 138:

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Mayuram, dated 19th April, 1979, and made in I.A. No. 442 of 1979 in O.S. No. 8 of 1979.

R. Balachandar, for Petitioners.

The Order of the Court was made by

Sengottuvelan, J.—This civil revision petition gives rise to an interesting point of law regarding the power of the civil Courts to stay the proceedings before them to meet the ends of justice under inherent powers available to the Courts under section 151 of the Civil Procedure Code, apart from section 10 of the Civil Procedure Code. The facts of this case are briefly as follows:

2. The plaintiffs in O.S. No. 8 of 1979 on the file of the Subordinate Judge, Mayuram, who are the respondents in I.A. No. 442 of 1979 are the petitioners in the above civil revision petition. The plaintiffs in O.S. No. 8 of 1979 are the owners of the suit lands and the first defendant in that suit seems to have entered into an agreement of sale with reference to the same on certain conditions set out in the agreement. The first defendant was also let into possession of the suit lands in pursuance of the agreement. The second defendant is the brother of the first defendant. The case set out in the plaint is that since the first defendant was a teacher at Orathanad, the second defendant, his brother was looking after the lands on behalf of the first defendant. Since first defendant failed to act according to the terms of the agreement of sale there was a compromise by which the plaintiffs agreed to pay a sum of Rs. 38,000 and on such payment the first defendant was bound to deliver possession of the lands to the plaintiffs. The suit O.S. No. 8 of 1979 was instituted for the relief of possession in pursuance of the agreement between the plaintiffs and the first defendant in the suit. On the institution of suit O.S. No. 8 of 1979, the defendants 2 to 9, who claimed to be cultivating tenants, filed an application I.A. No. 442 of 1979 under sections 10 and 151 of the Civil Procedure Code for staying the trial of the suit till the enquiry of the application filed by them in the prescribed Form V of the Tamil Nadu Record of Tenancy Act, pending before the Record Officer is over and the cases Nos. 273 to 279 of 1978 are disposed of.

3. In the affidavit filed in support of the application I.A. No. 442 of 1979, the petitioners 1 to 8, who are the defendants 2 to 9 in the suit O.S. No. 8 of 1979, contend that they are the cultivating tenants entitled to the benefit of Tamil Nadu Act XXV of 1955 and that they have also filed an application in Form No. 5 under the Tamil Nadu Record of Tenancy Act (X of 1969) and the same is taken on file as cases Nos. 273 to 279 of 1978 on the file of the Additional Tahsildar and Record Officer, Mayuram and they have also filed the relevant documents before the Record Officer. Only after the filing of applications in cases Nos. 273 to 279 of 1978 on the file of the Record Officer, by the respondents 2 to 9 in the above civil revision petition, the plaintiffs 1 and 2 in the abovesaid suit—the civil revision petitioners before this Court, filed the suit O.S. No. 8 of 1979. The suit for recovery of possession is not maintainable against cultivating tenants. In the interest of justice, the suit will have to be stayed till the proceedings before the Record Officer, Mayuram are disposed of.

4. The learned Subordinate Judge, Mayuram relying upon the decision of a single Judge of this Court reported in *Rayappan* v. *Sri Patteswaraswami Devasthanam by its E.O.*[1], ordered stay of the suit till the disposal of the proceedings before the Record Officer. This civil revision petition is filed against the orders of the Subordinate Judge, Mayuram staying the trial of the suit till the disposal of the proceedings before the Record Officer, Mayuram. The respondents in this civil revision petition *viz.*, the tenants are not represented before this Court.

5. The main points urged on behalf of the civil revision petitioners are as follows:—

"1. When provision is made under section 10 of the Civil Procedure Code, for stay of

1. (1978) 91 L.W. 459: (1977) T.L.N.J. 187.

suits the civil Courts can order stay of suits only in accordance with the principles laid down in that section;

2. The civil Courts cannot exercise any inherent power which is not provided under section 10 of the Civil Procedure Code".

In support of his contentions the learned Advocate for the petitioners cited the following decisions of the Supreme Court. In the case reported in *Nainsing* v. *Koonwarjee and others*[1], the Supreme Court observed as follows:—

"Under the inherent power of the Courts recognised by section 151, Civil Procedure Code, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of section 151 of the Code, where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same."

In the case reported in *Arjun Singh* v. *S. Mohindra Kumar and others*[2], the Supreme Court observed as follows:—

"It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code dealing with a particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Court. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates."

1. (1971) 1 S.C.J. 252: (1971) 1 S.C.R. 207: A.I.R. 1970 S.C. 997.

2. (1964) 5 S.C.R. 946: A.I.R. 1964 S.C. 993.

In the case reported in *Kazimar Peria Pallivasal by its Trustees* v. *Arumugham and others*[1], a Bench of this Court made the following observations:—

"The special excludes the general is elementary principle of law. When the Civil Procedure Code has provided for grant of such a relief of appointment of Receiver both under section 94 and under Order 40, rule 1, it would be improper to invoke the inherent jurisdiction of the Code (Court) under section 151 to entertain a bare suit for the appointment of a Receiver and hold that such interlocutory orders can be made in the absence of a request for any other main relief."

The principle laid down in the above cases is when a specific provision is made in the Civil Procedure Code, the Court cannot exercise inherent jurisdiction to by-pass the provision and grant relief not contemplated under the provisions of the Civil Procedure Code.

6. Section 10 of the Civil Procedure Code deals with the stay of the subsequently instituted civil suit during the pendency of the civil suit instituted earlier in some other Court provided the parties are the same and the issues involved are common. But in this case we are concerned with the question whether the civil suit instituted by the plaintiffs for recovery of possession is to be stayed till the disposal of the application filed by the tenants to register them as cultivating tenants under the provisions of Act X of 1969. The proceedings before the Record Officer cannot be termed as a civil proceeding. Hence, the principles laid down in the above decisions cannot be said to be applicable to the facts of this case. The question whether the civil suit for delivery of possession will have to be stayed pending decision of the Record Officer or the question whether, the parties concerned are cultivating tenants cannot come under section 10 of Civil Procedure Code, but will have to be considered under the inherent power of Courts to stay its proceedings under section 151 of Civil Procedure Code.

7. The learned Advocate for the petitioners also relied upon the ruling reported in *Sri*

1. (1975) T.L.N.J. 32.

Koppanaickenpatti Muthalammal Temple by its Poojari Varadappa Naicker v. *Marammal and others*[1], Ramaprasada Rao, J., as he then was had occasion to consider the application of section 10 of Civil Procedure Code, with reference to a civil suit and a proceeding under Act XXX of 1963 (Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari Act). In that case it has been observed as follows:—

> "In order to invoke section 10, Civil Procedure Code, it is essential that the two Courts are trying to exercise parallel jurisdiction over the subject-matter which is similar and are attempting to render decisions concurrently over all the issues which might arise for consideration in the pleadings. If this principle is strictly applied, it cannot be said that the revenue Court can decide on the matter of possession or any matter other than the recognition of the status of the petitioner as a tenant or an issue incidental for the issue of patta. Certainly, the Revenue Court cannot pass a decree for possession. In fact, the view of this Court is that the civil Court invariably has the ultimate jurisdiction to decide as to who is a tenant and who is not, in spite of summary disposals made by rent Tribunals under the agrarian law. Therefore, the issues which arise for consideration in the present case are wider and certainly different from the one which arose for consideration in the Revenue Court. Again, the civil Court has the right to determine not only the status of the petitioner as a tenant but certain other issues which go to the root of the matter and which investigation cannot concurrently be undertaken by the Revenue Court. The subject-matter of the proceedings in either of these Courts being different they cannot be said to be Courts exercising concurrent jurisdiction over the same subject-matter."

The view expressed in this case cannot be applied to the present case in view of the passing of Tamil Nadu Record of Tenancy Act and under this Act the Record Officer is given jurisdiction to decide as to whether a particular person is a cultivating tenant and the jurisdiction of the civil Court is taken away in this respect.

1. (1974) T.L.N.J. 113.

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8. Inasmuch as the proceedings of the Record Officer cannot be said to be a civil proceeding, the question arises whether the civil Court has jurisdiction to stay its proceedings pending decision by the Record Officer under its inherent jurisdiction under section 151 of the Civil Procedure Code. In the case reported in *Rayappan* v. *Sri Patteswara Swami Devasthanam by its E. O.*[1], Suryamurthi, J., held that in suitable cases the civil Court will be justified in exercising powers under section 151 of the Civil Procedure Code, to stay its proceedings. The decision reported in *Muniyandi* v. *Rajangam Iyer*[2], where a Bench of this Court held that under section 16-A of Act X of 1969, the civil Court has no jurisdiction to decide whether a particular person is a cultivating tenant and only the authority constituted under Act X of 1969 is empowered to determine whether a particular person is a cultivating tenant or not is also considered by the learned Judge. If a defence is raised in any suit on the ground that the defendant is a cultivating tenant it is necessary for him to establish that he is a cultivating tenant. In order to establish that a particular person is a cultivating tenant he can only apply to the Record Officer and have his name duly entered in the tenancy record register. In dealing with the rights of the tenant, Suryamurthy, J., observed as follows:

> "The civil revision petitioner will not be entitled to an injunction merely on the ground of possession. He has also to establish that he has a legal right to be in possession, *viz.*, that he is a cultivating tenant whose possession is protected under the Cultivating Tenants Protection Act. Therefore, it is necessary for him to establish in the suit not merely that he is in possession, but also that he is a cultivating tenant. This he can do only if his name is duly entered in the Tenancy Record Register. He has, therefore, rightly, applied to the Tenancy Records Officer to record him as a tenant in respect of the suit property.

1. (1977) T.L.N.J. 87.
2. (1976) 1 M.L.J. 344.

Until this application is finally disposed of it is not in the interests of justice that the suit should be tried and disposed of. In fact, without a finding as to whether the plaintiff has any legal right to continue in possession an injunction cannot be granted to the plaintiff, even if he proves that he is in possession. Apart from the provisions of section 10 of the Civil Procedure Code, the civil Court has ample jurisdiction under section 151 of the Civil Procedure Code to exercise its discretion and grant a stay in order to meet the ends of justice. The comity of Courts will have to be observed by civil Courts even though the connected proceedings are pending in a forum which cannot be strictly called a Court, let alone a civil Court.

I respectfully agree with the observations in *Aravan Servai* v. *Kamugan Servai*[1]. It would have been in the interests of justice if the learned District Munsif himself had stayed the suit pending the decision of the Tenancy Records Officer, for that would have finally settled the controversy as to whether the plaintiff is a cultivating tenant or not. If the plaintiff is not a cultivating tenant even though he may be in possession, he is not entitled to an injunction. Therefore, it is in the interests of justice that the trial of the suit should be stayed pending the disposal of the application by the plaintiff."

Relying on this decision, the learned Subordinate Judge ordered the stay of the trial of the suit till the disposal of the proceedings before the Record Officer. The learned Advocate for the petitioners also draws my attention to an un-reported decision of Sathiadev, J., in *S. Thangavelu* v. *V. Kamalanathan*[2], where the stay of the trial of the suit was asked for under similar circumstances. Sathiadev, J., while disposing of the matter observed as follows:—

"What is sought to be invoked in aid of the petitioner is the inherent power under section 151, Civil Procedure Code, which can be exercised by a civil Court if it is found necessary for the ends of justice or to prevent abuse of process of Court. If civil Courts are to await decisions of such statutory authorities, which do not become final unless and until the appeal and the revisional proceedings are over in a suit filed by a party seeking relief being kept pending for such a long number of years it would greatly affect the rights of parties. Mr. Parasaran, learned counsel claims that if his client succeeds before the Record Officer and in the meanwhile he has to deliver possession, his rights will be prejudicially affected. I could see no substance in this contention because, on the strength of final order passed under Tamil Nadu Act X of 1969, he can get back possession with the aid of the Court, and at which time the Court will necessarily act with the same swiftness with which it is expected to dispose of even the present matter. Equally, after keeping the suit filed by the landlord pending for years till the proceedings under Act X of 1969 reach finality, and ultimately in those proceedings if the tenant fails, and thereafter the suit is to be taken up for hearing, it would result in irredeemable loss to the lawful owner of property who has sought the aid of the civil Court for immediate relief of injunction. He may perhaps be compelled to file a suit claiming damages and languish in Courts for years more before getting possession of the property. Thus it will be noticed that ends of justice will be better met by a civil Court disposing of the matter at the earliest, with the available materials before it, and later on, depending on whatever rights that might be acquired or established by the claimants|parties or whatever they may be able to establish under any other statutory enactment, they can have recourse against the concerned party who had secured the orders in civil Court for injunction. In my view, a civil Court should dispose of such matters filed before it at the earliest point of time with the available materials before it without awaiting the decisions of administrative officers, which invariably take a procrastinated course. Inherent power, if it is to be exercised, should be to advance the course of justice, and necessarily to have it decided at the earliest point of time".

1. (1958) L.W. 532: (1958) 2 M.L.J. 505.
2. C.R.P. No. 3084 of 1978.

There is nothing in the judgment in *S. Thangavelu* v. *Kamalanathan*[1], to show that the earlier decision of Suryamurthy, J., reported in *Rayappan* v. *Patheeswaraswami Devasthanam by its E. O.*[2], was brought to the notice of the learned Judge as the same is not referred to in the judgment in *S. Thangavelu* v. *Kamalanathan*[1].

9. The question as to whether the proceedings before the civil Court involving the decision as to whether a particular person is a cultivating tenant or not is to be stayed pending the decision of the Record Officer is bound to arise in many cases. In view of the importance of the matter and in view of the fact the decision of this Court in the case reported in *Rayappan* v. *Sri Patheeswaraswami Devasthanam by its E.O.*[2], is in conflict with the decision in *S. Thangavelu* v. *Kamalanathan*[1], the above matter will have to be referred to a Bench of this Court for an autheritative pronouncement. The papers may be placed before my Lord the Chief Justice, for necessary orders.

R. Balachandar, Advocate, for Petitioners.

Respondents not appearing in person or by Advocate.

The Order of the Court was made by

Ramaswami, J.—The question that arises for consideration in this civil revision petition is whether a civil Court has jurisdiction under section 151 of the Code of Civil Procedure, to stay a suit, or proceeding involving a decision as to whether a particular person is a cultivating tenant or not, pending before it, on the ground that the tenant had applied for registration of his tenancy under the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (X of 1969), even if it is satisfied that such stay of the proceedings may be necessary for the ends of justice or to prevent the abuse of process of the Court. The civil revision petition came up for hearing before Sengottuvelan, J., who referred this matter for a consideration by the Division Bench in view of the importance of the matter and also on the ground that the decision of Sathiadev, J., in *S. Thangavelu* v. *Kamalanathan*[1], is in conflict with the decision of Suryamurthy, J., in *Rayappan* v. *Patheeswaraswami Devasthanam*[2].

1. C.R.P.No. 3084 of 1978.
2. 1977 T.L.N.J. 87: (1978) 91 L.W 459.

11. The petitioners herein filed O.S. No. 8 of 1979, on the file of the Subordinate Judge of Mayuram for recovery of possession of the plaint schedule properties. They entered into an agreement of sale with the first defendant in the suit and in part performance of that agreement also, they put the first defendant in possession of the properties. The first defendant is stated to be a teacher employed at Orathanad and the properties are situated in a different place, and in the circumstances therefore, the further case of the plaintiffs was that the first defendant put his brother, the second defendant, in possession of the properties and the second defendant was in possession and management as such manager of the first defendant. On certain allegations which, it is not necessary to refer, the plaintiffs claimed that the first defendant is not entitled to get a sale deed in his favour and that the plaintiffs are entitled to recover possession of the properties. The plaintiffs have added defendants 3 to 9 on the ground that they also claimed to be in possession under the second defendant.

12. After the summons in the suit were served on the defendants, defendants 2 to 9 filed I.A. No. 442 of 1979, purporting to be under sections 10 and 151 of the Code of Civil Procedure praying for a stay of the trial of the suit till the enquiry on their application filed before the Record Officer, Mayuram under the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (X of 1969), is disposed of. In the affidavit filed in support of this application, they had stated that they are cultivating tenants in respect of the suit properties, that they have filed the application in Form No. 5 on the file of the Additional Tahsildar and Record Officer, Mayuram to record their names as such cultivating tenants in respect of the suit properties,

1. C.R.P. No. 3084 of 1978.
2. (1978) 91 L.W. 459: (1977) T.L.N.J. 87.

that almost the examination of the witnesses in favour of the petitioners and the respondents was over, that the Record Officer has jurisdiction to decide as to whether the petitioners before him were cultivating tenants or not and that, if during the pendency of the enquiry before the Record Officer the suit is taken up for trial, their rights as tenants would be jeopardised and irrepairable loss and hardship will be caused to them.

13. While not disputing that the defendants 2 to 9 have filed such an application before the Record Officer, Mayuram and the enquiry was in progress, the plaintiffs filed a counter to the application denying that the defendants-petitioners had any such right as cultivating tenants and stating that they are not tenants under the plaintiffs. They further contended that by reason of the parallel proceedings before the Record Officer, they can successfully nullify the proceedings in the civil Court and that the ends of justice require that the civil proceedings should be proceeded with. It was further contended that section 10 of the Code is not applicable and there is no inherent jurisdiction vested in the Court either, to stay the proceedings of a civil Court, pending decision by the Record Officer. The learned Subordinate Judge, following the decision of this Court in *Rayappan* v. *Patheeswaraswami Devasthanam*[1], held that the civil Court had jurisdiction to stay the proceedings under section 151, Civil Procedure Code, and since the learned Subordinate Judge was satisfied that the ends of justice needed the stay of the trial of the suit, ordered the application and stayed the suit pending disposal of the proceedings before the Record Officer. It is against this order, the present civil revision petition has been filed.

14. The learned counsel for the petitioners contended that there is a specific provision relating to stay of suits under section 10 of the Code and unless the conditions referred to therein are satisfied, the Court had no jurisdiction to stay the trial of any suit and it is not possible for the Court in such circumstances to invoke the inherent powers under section 151 either. There can be no doubt that section 10 which enables the Court to stay the trial of suits in certain circumstances is not applicable to this case. The inherent powers also cannot be invoked by any Court when the exercise of such powers would be inconsistent with or opposed to the express provisions of the Code. But where the Code is silent, such powers can be exercised so long as it is not opposed to or prohibited by the provisions of the Code or when it relates to matters on which the Code cannot be said to be exhaustive. This was so held by the Supreme Court in the decision in *Arjun Singh* v. *Mohindra Kumar*[1] and *Nainsing* v. *Koonwarjee and others*[2]. In the former decision, the Supreme Court considered the powers of a Court to invoke section 151 of the Code of Civil Procedure, in considering an application for setting aside an *ex parte* decree and held that Order 9, rule 7 and Order 9, rule 13 of the Code, between them exhaust the whole gamut of situations that might arise during the course of the trial and that in such circumstances, there is no inherent power to be exercised *de hors* those mentioned in those provisions themselves. In other words, the Supreme Court held that the inherent power of a Court cannot be invoked to override the express provisions in the Code of Civil Procedure. In *Nainsing* v. *Koonwarjee*[2]. The Supreme Court was concerned with the question as to whether a party to a litigation who had allowed an order to become final without filing an appeal could try to question the same in a later stage of the same proceeding purporting to invoke the jurisdiction of the Court under section 151 of the Code. The party in that case questioned a remand order made by a Subordinate Judge when the matter came at a later stage before the High Court. The Supreme Court held that the remand order of the learned Subordinate Judge was appealable under section 105 (2) of the Code and without appealing and questioning the correctness of that order, it was not open to him to question the same when it came before the High Court against the decree of the trial Court after remand and the Court also had no jurisdiction to interfere with the order

1. (1978) 91 L.W. 459.

1. (1964) 5 S.C.R. 946: A.I.R. 1964 S.C. 993.
2. (1971) 1 S.C.J. 252: (1971) 1 S.C.R. 207: A.I.R. 1970 S.C. 997.

under section 151 of the Code of Civil Procedure. In the words of the Supreme Court:

> "........The Court cannot make use of the special provisions of section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further, the power under section 151 of the Code cannot be exercised as an appellate power".

But where the Code is silent and where the exercise of power is not opposed to or prohibited by the provisions of the Code, there could be no doubt that the Court could invoke its inherent jurisdiction if it is satisfied that it is necessary for the ends of justice or to prevent the abuse of the process of the Court.

15. The earliest direct authority on this question by this Court is the decision of Yahya Ali, J., in *Balaji Rao and others* v. *Natesa Chetty*[1]. In that case, the inherent jurisdiction of this Court was invoked for stay of an independent suit pending disposal of a civil miscellaneous appeal which arose out of a different proceeding. Objection was raised on the ground that the application was not maintainable as section 151 of the Code was not applicable and this Court had no jurisdiction to stay the trial of the suit out of which the proceedings in this Court did not arise. Overruling this objection, this Court held that the only limitation that could be placed upon the exercise of jurisdiction would be that the applicant for stay had no other remedy available to him in law which he could seek from a competent civil Court and that the stay had to be ordered in the ends of justice or to prevent abuse of the process of the Court. The learned Judge further observed that if these conditions are satisfied, there can be no doubt that the trial of an independent suit can be stayed by this Court in the exercise of its inherent powers under section 151 of the Code of Civil Procedure in the course of other proceedings pending before it. This decision was followed in a number of unreported judgments of this Court since 1947. The other direct reported decision is the one in *Rayappan* v. *Patheeswaraswami Devasthanam*[1]. That was also a case where a plaintiff who had filed a suit for a declaration that he is a cultivating tenant and for an injunction restraining the defendant from interfering with his possession filed an application for stay of his own suit under sections 10 and 151 of the Code of Civil Procedure, on the ground that he had applied to the Tenancy Record Officer for entering his name in the Tenancy Record Register as a cultivating tenant in respect of the suit lands and pending disposal of that petition his suit will have to be stayed. The learned Judge held that apart from the provisions of section 10, Civil Procedure Code, the civil Court has ample jurisdiction to grant a stay in order to meet the ends of justice. It was also observed that the comity of Courts will have to be observed by civil Courts even though the connected proceedings are pending in a forum which cannot be strictly called a Court, let alone a civil Court. Though ultimately the order of Sathiadev, J., in *Thangavelu* v. *Kamalanathan*[2], upheld the order of dismissal of an application filed under sections 10 and 151 of the Code of Civil Procedure, for stay of trial of a suit pending disposal of proceedings under the Record of Tenancy Rights Act, in our view it is not an authority for holding that the Court had no inherent jurisdiction to stay the trial of any independent proceedings in cases where section 10 is not strictly applicable.

16. The facts in the decision in *Thangavelu* v. *Kamalanathan*[2], were as follows:

The suit was one for recovery of possession on the basis of title to property. The father of the defendant in that suit had earlier claimed in respect of the same suit property that he was a cultivating tenant. That suit was dismissed holding that he was not a cultivating tenant. The appeal and the second appeal filed against that order were also dismissed. In the suit they had also claimed for a permanent injunction. With reference to that this Court had observed that the owner of the property could dispossess the defendant only in a properly instituted pro-

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1. (1947) 1 M.L.J. 330: 60 L.W. 276: A.I.R. 1948 Mad. 138.

1. (1978) 91 L.W. 459.
2. C.R.P. No. 3084 of 1978.

ceedings. It is in those circumstances, the suit was filed for recovery of possession. By the time the suit was filed, the defendant's father who had filed the original suit for declaration that he is a cultivating tenant died and his sons in the suit claimed that they are the cultivating tenants. The learned Judge held that since in the prior proceedings the father of the defendants was held to be not a cultivating tenant and his suit for declaration that he is a cultivating tenant was dismissed, there was no scope for the defendants to claim that they were the cultivating tenants. It is in those circumstances, when one of the defendants filed an application under sections 10 and 151 of the Code for stay of the suit for possession on the ground that he had filed an application before the Record Officer,, it was dismissed. The learned Judge, therefore, considered that the exercise of inherent power to stay the trial would not advance the course of justice.

17. The decision, therefore, was one on merits and not relating to the jurisdiction of the Court under section 151 of the Code. We have no doubt that a civil Court has jurisdiction under section 151 of the Code to stay the trial of a suit pending before it, pending the decision of the question of rights as a cultivating tenant before the Record Officer. The decision of Ismail, J., as he then was in *Natesan* v. *Thanigayvel*[1], shows more of instances where the jurisdiction should not be invoked rather than deciding as to whether the Court had jurisdiction to stay or not. In that decision, the learned Judge held that where the plaintiff had not put forward a contention that he was a cultivating tenant, and all that he contended was that he was entitled to remain in possession of the property for the period of the lease, the question of the plaintiff being a cultivating tenant and his getting his name registered under the Record of Tenancy Rights Act, did not arise and that therefore there was no justification for invoking the jurisdiction of the Court under section 151 of the Code to stay the trial of the suit on the ground that the plaintiff had filed an application before the Tenancy Record Officer. The decision of Ramaprasada Rao, J., as he then was in *Sri Koppanaickenpatti Muthalamman Temple by its Poojari, Varadappa Naicker* v. *Marammal and others*[1], referred to by the learned counsel was concerned with the question of applicability of section 10 to stay the proceeding when a similar proceeding under Act XXX of 1963, was pending. The jurisdiction of the Court under section 151 of the Code was not invoked. The learned Judge applied the tests in section 10 and found that the provisions were not satisfied and that, therefore, that is not an authority for holding that section 151 should not be invoked for stay of trial.

18. For the foregoing reasons, we are of the view that the civil Court has jurisdiction to stay the trial of a suit pending before it invoking its inherent powers under section 151 during the pendency of a proceeding before the Record Officer, but the exercise of such power would depend on the facts and circumstances in each case and on the finding whether the ends of justice called for such a stay or in order to prevent the abuse of process of the Court, the stay should be granted. The revision petition accordingly fails and it is dismissed. No costs.

R.S. ——— *Civil revision petition dismissed.*

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1. (1978) T.L.N.J. 316.

1. (1974) T.L.N.J. 113.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J*

K. R. Kuppuswami Iyengar .. *Petitioner**

v.

Samikkannu Padayachi .. *Respondent.*

Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), sections 3 (4) (a) and 4-A (2)—Petition for eviction by landlord—Tenancy in respect of 1 ac. 37 cents—Fair rent fixed in respect of 1 ac. 4 cents—Resumption of one half of the land by landlord —Allegation that the rent was not paid for the period before resumption — Revenue Court holding remedy to be to go to civil Court to collect arrears of rent — Revenue Court's order not tenable.

A consideration of the provisions of the Tamil Nadu Cultivating Tenants Protection Act, particularly section 3 thereof points out that though generally a cultivating tenant would be entitled to protection from eviction in respect of his holding, yet, under certain circumstances, such protection would not be available. One of such situations would be when the cultivating tenant has not paid the rent within a month after such rent became due. If, therefore, the cultivating tenant does not pay the rent within the time provided under the provisions of the Act, the protection from eviction is withdrawn and the landlord is entitled to move the appropriate machinery constituted under the Act to secure an order for eviction on the very ground that the cultivating tenant has forfeited the protection from eviction owing to non-payment of the rent. The remedy of a landlord in such case is to file an application praying for an order of eviction against the cultivating tenant from his holding, that is, the parcel or parcels of the land held by him. It may be that the holding continues to be the same or is altered either voluntarily or by operation of law, as in this case. But the remedy conferred on the landlord for the non-payment of rent by the cultivating tenant would be to evict the cultivating tenant from the land held by him. In this case, during the fasli in question, the cultivating tenant was in enjoyment of the entire holding and was therefore, liable to pay rent in respect thereof, which admittedly he had failed to pay. Under those circumstances, on the failure of the respondent to pay the rent within one month after such rent became due, the petitioner secured a right to evict the respondent from the entirety of the holding, or any part thereof but as a result of the proceedings for resumption initiated by the petitioner herein, the original holding had merely shrunk in size, in the sense that it had been halved. But on this account, the right of the petitioner to evict the respondent-cultivating tenant from the holding which forms a part of the previous holding, cannot be said to have been in any manner affected. Otherwise all that a cultivating tenant has got to do is to part with a portion of the holding in some manner or other and the cultivating tenant, though he does not pay the rent in respect of the holding, would nevertheless be enabled to say that the arrears of rent is not in respect of the holding held by him. That would mean that the cultivating tenant can successfully avoid paying rents to the landlord in respect of the holding and by the process of diminishing the size of the holding virtually secure a total immunity from eviction, quite contrary to the provisions of the Act. Such a situation cannot be recognised and encouraged at all even under the guise of affording protection to the cultivating tenant from unreasonable or unjust eviction. When once a cultivating tenant renders himself liable to be evicted, as a result of the non-availability any longer of the protection from eviction, then he can be evicted from his holding, irrespective of whether the loss of such protection was on account of a failure to pay rent in respect of a larger holding or the actual holding, as the case may be. [*Para.* 6.]

The effect of the proceedings for resumption taken by the landlord under section 4-A is merely to reduce the size of the holding and not to create a new tenancy in respect of which a right to evict will arise in favour of the landlord only in the event of the cultivating tenant failing to pay the rent in respect of the reduced holding only.

[*Para.* 6.]

*C.R.P. No. 406 of 1975.

9th November, 1981.

Case referred to:—

Palaniswami Gurukkal v. *Kandappa Gounder*, (1967) 2 M.L.J. 438: 80 L.W. 305: I.L.R. (1968) 1 Mad. 769: A.I.R. 1968 Mad. 96.

V. Swaminathan, for Appellant.

The Court made the following

ORDER.—The landlord is the petitioner in this civil revision petition. An application under section 3 (4) (*a*) of the Tamil Nadu Cultivating Tenants Protection Act (XXV of 1955), (hereinafter referred to as the Act), was filed by the petitioner, praying for an order of eviction against the respondent, on the ground that the respondent had not paid the fair rent fixed in respect of an extent of 1 acre and 4 cents and also the rent of Rs. 500 in respect of an extent of 33 cents of coconut tope, for fasli 1382 (1st July, 1972 to 30th June, 1973). In the course of the application, the petitioner had stated that fair rent had been fixed only in respect of an extent of 1 acre and 4 cents out of a total extent of 1 acre and 37 cents at Rs. 286 and that even that rent had not been paid in respect of the cultivable lands. As regards the coconut tope of an extent of 33 cents, the petitioner stated that the yield from the 51 coconut trees would be 3,000 coconuts out of which the petitioner's share would be 1,000 coconuts, but restricted his claim to a sum of Rs. 500 towards this. In the application for eviction, the petitioner had also adverted to the proceedings initiated by him under section 4-A (2) of the Act for resumption of one-half of the extent under the cultivation of the respondent and his taking possession of 68½ cents out of 1 acre and 37 cents under the cultivation of the respondent, as per the order of the revenue Court, dated 5th September, 1973. The application for eviction was filed by the petitioner towards the end of 1973, after the resumption of one-half of the extent of the lands under the cultivation of the respondent.

2. This application was resisted by the respondent on the ground that the fair rent in respect of 1 acre and 4 cents out of 1 acre and 37 cents had not been finally fixed and that, therefore, the rent is payable only in accordance with the adjudication in O.S. No. 778 of 1969, District Munsif's Court, Chidambaram, at the rate of Rs. 100 for the land of an extent of 1 acre and 4 cents and Rs. 100 for the 33 cents of coconut tope. There was no yield at all in fasli 1382 from the coconut tope, according to the respondent, and only a sum of Rs. 100 was payable towards rent. The claim for rent made by the petitioner for the land as well as the coconut tope was characterised as exaggerated. Ultimately, the respondent prayed that he may be granted two months' time to pay the entire rent of Rs. 200 for the total extent of 1 acre and 37 cents.

3. Before the Revenue Court, Mayuram, the petitioner was examined-in-chief on 25th September, 1974 and the further examination was deferred. Thereafter, on 11th October, 1974, the Revenue Court proceeded to pass an order directing the respondent to pay the petitioner a sum of Rs. 188-50 P. This was on the footing that the remedy of the petitioner was before the civil Court to collect the arrear of rent in respect of one-half of the property already taken possession of by the petitioner and the respondent is liable to pay Rs. 188-50 P. being the proportionate fair rent for 68½ cents, on the basis of the fixation of the fair rent for 1 acre and 4 cents at Rs. 286. It is the correctness of this order that is challenged in this civil revision petition.

4. The first contention of the learned counsel for the petitioner is that the revenue Court was in error in holding that the remedy of the petitioner would be to collect the arrear of rent through a civil Court, especially when the respondent was a cultivating tenant in respect of the entire extent of 1 acre and 37 cents during the fasli in question, namely, fasli 1382 and had not paid the rent. In this connection, the learned counsel for the petitioner relied on section 14 of the Tamil Nadu Fixation of Fair Rent Act and also the decision in *Palaniswami Gurukkal* v. *Kandappa Gounder*[1]. On the other hand, the learned counsel, for the respondent submitted that with reference to arrears for a previous fasli, the cultivating tenant cannot be evicted from his holding which is really a new holding as a result of the resumption proceedings and that

1. (1967) 2 M.L.J. 438: 80 L.W. 305: I.L.R. (1968) 1 Mad. 769: A.I.R. 1968 Mad. 96.

only in respect of default in the payment of rent with reference to such a holding, an order for eviction can be passed against the respondent and such not being the case, the Revenue Court was justified in directing the petitioner to resort to the remedy before the civil Court.

5. In order to appreciate and consider the rival submissions, it is necessary to examine the relevant provisions of the Tamil Nadu Act XXV of 1955. That Act had been passed with the avowed object of protecting the cultivating tenants from unjust eviction and to afford protection to them. Section 2 of the Act contains the definitions of "cultivating tenant", "landlord", etc. In this case, there is no dispute that the respondent is a cultivating tenant and the petitioner is a landlord and, therefore, it is unnecessary to notice the definition of these expressions. Section 2 (*c*) of the Act defines "holding" as meaning "a parcel or parcels of land held by a cultivating tenant". The other definitions in section 2 of the Act are unnecessary for purposes of the present case. Section 3 (1) of the Act confers on cultivating tenants a protection from eviction by or at the instance of the landlord, be it in execution of a decree or order of a Court or even otherwise. But even as indicated by the opening words of section 3 (1) of the Act, the protection from eviction is not total or absolute, but only subject to the provisions made in the succeeding sub-sections. The protection conferred by section 3 (1) of the Act on cultivating tenants from eviction extends to the holding of such cultivating tenants or any part thereof. Under section 3 (2) of the Act, the protection from eviction conferred under section 3 (1) of the Act has been made inapplicable to a cultivating tenant under certain circumstances. Section 3 (2) (*a*) of the Act negatives such a protection to the cultivating tenant in areas where the Thanjavur Tenants and Pannaiyal Protection Act, 1952 was in force before the date of the coming into force of the Tamil Nadu Cultivating Tenants Protection (Amendment) Act, 1956, if at the commencement of the Act (Tamil Nadu Act XXV of 1955), the cultivating tenant was in arrears and does not pay such rent within six weeks after such commencement. The section further provides that if in respect of rent payable by the cultivating tenant to the landlord after the commencement of the Tamil Nadu Act XXV of 1955, the cultivating tenant does not pay such rent within a month after such rent becomes due, then even in that case the protection conferred under section 3 (1) of the Act is not available. Section 3 (2) (*aa*) of the Act makes provision for areas where the provisions of Thanjavur Tenants and Pannaiyal Protection Act, 1952 were not in force. With reference to those areas, if the arrears of rent payable to the landlord and accrued due subsequent to 31st March, 1954, is not paid within a month after the commencement of the Tamil Nadu Act XXV of 1955 or in respect of rent payable after such commencement, the cultivating tenant does not pay the rent to the landlord within a month after the rent becomes due, then in those events, the protection from eviction again would not be available. Section 3 (2) (*c*) and (*d*) of the Act and the *Explanations* do not have any application to the present case. Section 3 (3) (*a*) of the Act provides for the deposit of rents by the cultivating tenant or if the rent is payable in kind, its market value on the date of deposit, to the account of the landlord. Section 3 (3) (*a*) (i) of the Act provides for the deposit of rents accrued due subsequent to 31st March, 1954, within a month after the commencement of Tamil Nadu Act XXV of 1955. Under section 3 (3) (*a*) (ii) of the Act, it is provided that in the case of rent accrued due after the commencement of the Tamil Nadu Act XXV of 1955, it should be deposited within a month after the date on which the rent accrued due. Section 3 (3) (*b*) of the Act provides for a summary enquiry into the correctness of the deposit and for the granting of further time, if necessary, to enable the cultivating tenant to make good the deficiency. Further provision is also made thereunder that if the deposit is found to be correct, or the deficiency is made good within the time granted, then the cultivating tenant is deemed to have paid the rent. If the cultivating tenant fails to make good the deficiency after having been granted time to do so, then the landlord is given the right to evict the cultivating tenant as provided under section 3 (4) of the Act. Section 3 (4) (*a*) of the Act confers a right on a landlord to seek an order for eviction against a cultivating tenant by making an application to the Revenue Divisional Officer. Section 3 (4) (*b*)

of the Act provides for the holding of a summary enquiry into the matter and for the passing of an order, either allowing the application or dismissing it and in a case where the cultivating tenant had not availed himself of the statutory provisions relating to deposit, the Revenue Divisional Officer has been empowered to allow such time as he considers just and reasonable to enable the cultivating tenant to deposit the arrears of rent. If there is a deposit by the cultivating tenant, then again he shall be deemed to have paid the rent under sub-section (3) (*b*) of section 3 of the Act. But if the cultivating tenant fails to deposit the same, then the Revenue Divisional Officer is obliged to pass an order for eviction. Section 4 of the Act provides for the remedy of a dispossessed cultivating tenant to be restored to possession and in this case that provision has no application. Section 4-A (1) of the Act, as it then stood prior to its deletion by section 2 of the Tamil Nadu Act XVIII of 1976 effective from 5th July, 1973, provided for the resumption by a landlord from the cultivating tenant of an extent of land not exceeding one-half of the extent leased out to the cultivating tenant for the purpose of personal cultivation. Section 4-A (2) of the Act provided for the filing of an application for this purpose by the landlord and the holding of an enquiry into the matter by the Revenue Divisional Officer and for the passing of an order, either directing the restoration or dismissing the application. Powers to impose conditions on the landlord in the matter of reimbursement of the expenses incurred by the cultivating tenant or the labour contributed by him or any unharvested crop had also been conferred on the Revenue Divisional Officer. Section 4-A (3) of the Act provided for the retention by the cultivating tenant of one-half of the extent sought to be resumed by the landlord by an offer to pay the rent at the rate payable before 27th September, 1955. Section 4-A (4) and (5) of the Act enumerated the circumstances under which a landlord would be disqualified from resuming possession of one-half of the extent. Section 4-A (6) of the Act outlined the consequences of a failure on the part of the landlord to carry on personal cultivation within a year of resumption and the allowing of the land to lie fallow or the securing of an order for resumption under fraudulent misrepresentations. In all those cases, on an application by the cultivating tenant, the Revenue Divisional Officer was empowered to restore the cultivating tenant to that land so that he may hold it with all the rights and subject to all the liabilities of a cultivating tenant. The other provisions of the Act do not throw any light on the controversy in the present case and need not, therefore, be noticed.

6. A consideration of the provisions of the Act particularly section 3 thereof points out that though generally a cultivating tenant would be entitled to protection from eviction in respect of his holding, yet, under certain circumstances, such protection would not be available. One of such situations would be when the cultivating tenant has not paid the rent within a month after such rent becomes due. If, therefore, the cultivating tenant does not pay the rent within the time provided under the provisions of the Act, the protection from eviction is withdrawn and the landlord is entitled to move the appropriate machinery constituted under the Act to secure an order for eviction on the very ground that the cultivating tenant has forfeited the protection owing to non-payment of the rent. In other words, the right to enforce the consequences of such non-payment would arise in a case where the cultivating tenant had not paid the rent within a month after the rent becomes due. The remedy of a landlord in such cases is to file an application praying for an order of eviction against the cultivating tenant from his holding, that is, the parcel or parcels of the land held by a cultivating tenant. The non-payment of rent by a cultivating tenant is visited with the consequence of his being evicted from the parcel of the land which is under his cultivation. It may be that the holding continues to be the same or is altered either voluntarily or by operation of law, as in this case. But the remedy conferred on the landlord for the non-payment of rent by the cultivating tenant would be to evict the cultivating tenant from the land held by him. In this case, as seen earlier, during the fasli in question, the cultivating tenant was in enjoyment of the entire holding and was, therefore, liable to pay rent in respect thereof, which admittedly he had failed to pay. Under those circumstances, on the failure of the respondent to pay the rent within one month after such rent became due,

the petitioner secured a right to evict the respondent from the entirety of the holding, or any part thereof but as a result of the proceedings for resumption initiated by the petitioner herein, the original holding has merely shrunk in size, in the sense that it had been halved. But on this account, the right of the petitioner to evict the respondent-cultivating tenant from the holding which forms a part of the previous holding, cannot be said to have been in any manner affected. To accept the contention of the learned counsel for the respondent would lead to startling results. All that a cultivating tenant has got to do is to part with a portion of the holding in some manner or other and the cultivating tenant, though he does not pay the rent in respect of the holding, would nevertheless be enabled to say that the arrears of rent is not in respect of the holding then held by him. That would mean that the cultivating tenant can successfully avoid paying rent to the landlord in respect of the holding and by the process of diminishing the size of the holding virtually secure a total immunity from eviction, quite contrary to the provisions of the Act. Such a situation cannot be recognised and encouraged at all even under the guise of affording protection to the cultivating tenant from unreasonable or unjust eviction. When once a cultivating tenant renders himself liable to be evicted as a result of the non-availability any longer of the protection from eviction, then he can be evicted from his holding, irrespective of whether the loss of such protection was on account of a failure to pay rent in respect of a larger holding or the actual holding, as the case may be. In the present case, as noticed earlier, the relationship of landlord and cultivating tenant has not in any manner been altered by the resumption proceedings. The effect of the proceedings taken by the petitioner for resumption under section 4-A of the Act is merely to reduce the size of the holding. It cannot be stated to be a new tenancy in respect of which a right to evict would arise in favour of the landlord only in the event of the cultivating tenant omitting to pay the rent in respect of the reduced holding only. Having regard to these considerations, the decision relied on by the learned counsel for the petitioner is not really helpful as that dealt with a case of the power of the Revenue Court to give a direction regarding the deposit of time-barred rent by a cultivating tenant. Likewise, section 14 of the Tamil Nadu Act, XXIV of 1956 also does not assist the petitioner as that provision merely enables the cultivating tenant who is disqualified from claiming the benefits of the fixation of fair rent to avail himself of those benefits by relinquishing such portion of the land as would enable him to take advantage of the benefits of that Act. In view of the above considerations, the Revenue Court was in error when it held that the petitioner has to work out his remedy in respect of the extent resumed only before the civil Court and not in these proceedings.

7. The learned counsel for the petitioner next contended that the Revenue Court fell into a serious error in proceeding to fix the amount to be deposited by the respondent, on the basis of the fixation of fair rent in respect of 1 acre and 4 cents and in proportion to the extent of 68½ cents held by the respondent. The learned counsel for the respondent also frankly admitted that the mode of computation of the arrears by the Revenue Court is erroneous. For the fasli in question, namely, 1382, the respondent was in possession of the entire extent of 1 acre and 37 cents, including 33 cents of cocoanut tope in respect of which no fair rent had been fixed. The sum of Rs. 286 fixed as fair rent is only for 1 acre and 4 cents and in respect of an extent of 33 cents of cocoanut tope it could only be on the basis of contract or reasonable rent. In this case, though the respondent denied having got any yield from the cocoanut trees, yet, there is absolutely no evidence whatever in support thereof. On the other hand, the evidence of the petitioner examined as P.W. 1 is to the effect that there are 51 cocoanut trees and that there would be formally five cuttings during the course of the year and that would yield about 800 cocoanuts every time. Out of 4,000 cocoanuts, the petitioner has claimed only 1,000 cocoanuts, the value of which has been estimated by him at Rs. 750. But even that had been rounded off to Rs. 500 in the application for eviction as well as in his evidence. There is absolutely no contra evidence. The amount of Rs. 500 claimed by the petitioner is very reasonable. Therefore, for the fasli in question the respondent had not paid the petitioner the sum of Rs. 786, namely, Rs. 500 towards the cocoanut tope and Rs. 286 for the extent of

1 acre and 4 cents of land. From the records it is found that a sum of Rs. 188-50P. has been paid by the respondent pursuant to the order of the Revenue Court. Since the computation of the arrears, by the Revenue Court has been held to be incorrect, the respondent would still be liable to pay Rs. 597-50P.

8. The order of the Revenue Court, Mayuram, is, therefore set aside and the respondent is directed to deposit to the credit of P. No. 132 of 1974, Revenue Court, Mayuram, a sum of Rs. 597-50P. on or before 30th November, 1981. If the respondent fails to do so, the Revenue Court will proceed to pass appropriate further orders. The civil revision petition is, therefore allowed. No order as to costs.

R.S. —— *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Sathiadev, J.*

K. Jayaprakash .. *Petitioner**

v.

The Executive Authority, Tiruthangal Town Panchayat, Tiruthangal, Sattur Taluk, Ramanathapuram District .. *Respondent.*

Tamil Nadu Panchayats Act (XXXV of 1958) and Rules framed under the Act — Enhancement of property-tax in between two general revisions—Special notice of enhancement given under rule 10 (3)*—No reasons disclosed in the notice—No opportunity for making representations given — Enhancement not validly made.*

Rule 10 (3) of the Rules framed under the Tamil Nadu Panchayats Act, enables the executive authority to make a special revision of house-tax but it can be done only after intimating by a special notice to the owner or occupier of the house that his representation for revising the enhancement will be considered, if it reaches the Panchayat Office within thirty days from the date of service of such notice. Hence it is not sufficient to merely issue a special notice and straightaway enhance the tax unless the representations made by the petitioner opposing the proposed enhancement of tax had been considered and disposed of. The notice served on the petitioner did not state the grounds which prevailed upon the executive authority to revise the tax demands. It is necessary for the executive authority to furnish the reasons, so that the remedy provided under the Rules could be effectively and successfully utilised by the affected parties.

In the present case, there being no such order passed, and served on the petitioner except the special notice issued in a printed form furnishing therein the extent to which the tax is being raised, it becomes all the more necessary to remit the matter to enable the respondent to deal with it afresh by passing an order justifying the enhancement. [*Para.* 4.]

Dalavai v. *Government of Tamil Nadu,* (1978) 1 M.L.J. 93, followed.

Case referred to:—

Dalavai v. *Government of Tamil Nadu,* (1978) 1 M.L.J. 93.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent relating to the Assessment No. 661 (1), dated 15th April, 1976, regarding the petitioner's property in Door No. 163 and quash the same.

D. Raju, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondent.

The Court made the following

ORDER.—This writ petition is filed against enhancement of property-tax in between two general revisions, and according to the petitioner, when respondent has issued a special notice of house-tax amendment under rule 10 (3) of the Rules issued under Tamil Nadu Panchayats Act, 1958, dated 15th April, 1976, he has failed to disclose the reasons which prevailed for making a special revision.

2. Rule 10 (3) enables the executive authority to make a special revision but it can be

*W.P. No. 353 of 1979.
25th September, 1981.

done by him after intimating by a special notice to the owner or occupier of the house that the petition for revising the assessment will be considered, if it reaches the Panchayat Office within thirty days from the date of service of such notice.

3. Hence it is not sufficient to merely issue a special notice and straightaway enchance the tax unless the representations made by the petitioner opposing the proposed enhancement of tax had been considered and disposed of. The notice served on the petitioner does not state the grounds which prevailed upon the executive authority to revise the tax demands. In the absence of such disclosure, as held in *Dalavai* v. *Government of Tamil Nadu*[1], whenever special notice is issued, it is obligatory for the concerned tax authority to disclose reasons for the conclusion arrived at therein. No doubt the said decision was rendered under the Tamil Nadu City Municipal Corporation Act, but the principles enumerated therein would be equally applicable in respect of the Special notice issued under the Panchayats Act. The learned Judge stated:—

> "Unless the assessee is told as to what is the reason for the enhancement in the assessment, he may not know on what ground the enhancement has been made. In such cases, he may not be able to put forward his objection specifically and effectively".

Apart from this reason stated in the said judgment, there is yet another factor, which also has to be taken note of, it being when the rules themselves provide for a revision petition, unless the assessee knows the grounds on which enhancement has been made, it would not enable him to prefer effectively a revision petition. Remedies provided under the Rules or enactments cannot be reduced to ineffectiveness. To make them effective and purposeful remedies, particularly when an appeal or revision is provided, it is incumbent on the original authority to state the reasons for the conclusion arrived at. Therefore, it is all the more necessary for the executive authority to furnish the reasons, so that the remedy provided under the Rules could be effectively and successfully utilised by affected parties.

4. In this matter, there being no such order passed, and served on the petitioner except the special notice issued in a printed form furnishing therein the extent to which the tax is being raised; it becomes all the more necessary to remit the matter to enable the respondent to deal with the matter afresh by passing an order justifying the enhancement.

5. It is stated that during the pendency of the writ petition, he has had the advantage of an order of stay of the recovery of the enhanced rate of tax. Therefore, till orders are passed as directed above, the petitioner would be entitled to the same benefit of continuing to pay taxes at the same rate, but, this would not confer upon him any right to later on claim, that he would not be liable to pay any enhanced rate of tax that may be fixed, for the period involved in the writ petition and for later years. With these directions, this writ petition is allowed. No costs.

R.S. ——— *Writ petition allowed.*

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1. (1978) 1 M.L.J. 93.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Muniandi Kone and others .. *Appellants**

v.

Sri Ramanatha Sethupathi Hereditary Trustee of Arulmigu Mangalanathaswami Temple at Thiru Uthirakosamangai, through his Diwan and Administrative Secretary at Ramanathapuram (died) and another .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908), *section* 9.

(B) *Tamil Nadu Hindu Religious and Charitable Endowments Act* (*XXII of* 1959) *—Temple under management of Raja of Ramnad as hereditary trustee — A deity of Vishnu also in the same temple—Festival for ten days every year in Chitrai—Custom to take the aforesaid deity on the tenth day in procession to another temple (Govindaswami temple)—Pooja and other services done there to the deity and returned to the main temple in the night — Right whether a civil right—Defendant not permitting deity to be taken out — Suit for declaration and injunction—Jurisdiction of civil Court, whether excluded.*

Held: The well-established legal position is that suits relating to rites and rituals in a temple are not of a civil nature. However, the right to worship is a civil right which can be agitated in a civil Court. In the present case, the exercise of the customary right to take a deity in procession on a particular occasion during an annual festival was not allowed on the ground that there had been some breaks in some years and that only on payment of Re. 1, the deity was being allowed to be taken out, so much so, the right was not unconditional and absolute. The payment of Re. 1, before the deity could be taken out was a pre-requisite and part of the customary right and could not be divorced from it. Only on this payment, the plaintiffs' community had been allowed to take the deity to their temple over a long period. This customary right was not exercised in certain years because of a dispute that the amount had not been paid in time. When the exercise of a right is conditional on a payment and the payment cannot be divorced from the right, then, if the payment was not made, the temple authorities would be justified in not permitting the deity to be carried out. After all a customary right has to be exercised with all its obligations too. This does not, however, mean that the temple authorities can refuse to receive the amount and prevent the plaintiffs' community from exercising the right. The custom in the present case, fulfils all the requisites which are considered in the context of a valid custom.

[*Paras.* 14 *and* 17.]

Taking into account the facts here, it can be held that the plaintiffs have established a customary right to worship the deity by taking it from the main temple to the Govindaswami temple on the tenth day of Chitrai festival. As the matter pertains to a civil right, the plaintiffs will have a declaration, and the other prayers incidental to this declaration asked for in the plaint will have to follow. [*Para.* 19.]

Cases referred to:—

Narayana Mudali v. *Peria Kalathi Mudali,* (1939) 1 M.L.J. 199: 49 L.W. 295: (1939) M.W.N. 273: 185 I.C. 239: A.I.R. 1939 Mad. 494; *Gounders of Vilamgathur Village, represented by Velayudha Goundan* v. *Udayars of Vilangathur Village, represented by Ponnuswami Udayar,* (1945) 1 M.L.J. 300: 58 L.W. 287: (1945) M.W.N. 358: A.I.R. 1945 Mad. 234; *Ugam Singh* v. *Kesrimal,* (1971) 1 M.L.J. 539; *Sri Sinna Ramanuja Jeer* v. *Sri Ranga Ramanuja Jeer,* (1962) 2 S.C.R. 509: (1962) 1 S.C.J. 17: (1962) 1 M.L.J. (S.C.) 1: (1962) 1 An. W.R. (S.C.) 1: A.I.R. 1961 S.C. 1720; *V. Srinivasachariar* v. *Thatha Desika Thathachariar,* (1970) 83 L.W. 407; *Subbaraya Mudaliar* v. *Vedantachariar,* (1905) I.L.R. 28 Mad. 23: 14 M.L.J. 171; *Kadirvelu Chetty* v. *Nanjunda Iyer,* (1916) 2 L.W. 512; *K. A. Srinivasa Ayyangar* v. *S. Ramanujachariar,* (1941) 1 M.L.J. 322: I.L.R. (1941) Mad. 544: 53 L.W. 315: A.I.R. 1941 Mad. 498.

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*S.A. No. 2451 of 1971.

6th July, 1981.

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram at Madurai, dated 26th July, 1977 and passed in Appeal Suit No. 46 of 1977, preferred against the decree of the Court of the District Munsif of Ramanathapuram in Original Suit No. 102 of 1975.

T. R. Mani and *S. Chandramouli,* for Appellants.

P. Narasimhan and *S. Muthu,* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in O.S. No. 102 of 1975 in the Court of the District Munsif, Ramanathapuram are the appellants.

2. The suit was filed for a declaration that the plaintiffs were entitled to take Arulmigu Mangaiperumal deity in procession on the tenth day of Chitrotsavam festival and for a permanent injunction restraining the defendant from preventing the plaintiffs in taking the deity in procession and also for a mandatory injunction directing the defendant and his men to take the deity from the *sanctum sarctorum* for the said procession on every Chitra pournami day.

3. In Uthirakosamangai village, there is a temple called Mangaleswari Sametha Mangalanathaswami temple. The temple is managed by the Raja of Ramnad as a hereditary trustee. In the same temple, there is a deity of Vishnu called Mangai Perumal. In the month of Chitrai, *i.e.*, April-May every year, a festival for ten days is celebrated in the temple. On the tenth day festival, which corresponds to the Chitra Pournami day, the plaintiffs claim, that they used to take the said Mangai Perumal deity from the main temple in the morning in Kuthirai Vaganam to another temple called Govindaswami temple belonging to the plaintiffs. In Govindaswami temple, pooja and other services would be done to the deity and the deity would be returned to the main temple in the evening. The plaintiffs claim that they had been exercising this right for a long time from time immemorial. In or about 1973, there appears to have been a faction between the plaintiffs, who are Yadavas, and Pillaimars in the said village and the main temple, under the management of Raja of Ramnad, which is predominantly worshipped by the Pillai community. As their right to worship in the customary way was denied, the plaintiffs came forward with the present suit.

4. The defendant denied the existence of any such custom or any right in the Yadavas taking the Mangai Perumal deity to the Govindaswami temple. The defendant also contended that the claim of the plaintiffs was not a civil right which could be adjudicated by a civil Court.

5. The learned District Munsif, after considering the oral and documentary evidence, held that the right claimed by the plaintiffs was a civil right and that the jurisdiction of the civil Court was not excluded. A decree was, therefore, granted in favour of the plaintiffs as prayed for. On appeal, the learned Subordinate Judge held that the right claimed by the plaintiffs was only in the nature of a right to perform a ritual and that the civil Court cannot interfere in such matters. He, therefore, dismissed the suit. The present second appeal has been filed by the unsuccessful plaintiffs.

6. Mr. T. R. Mani, learned counsel for the appellants contended that the right to take the deity in procession to the Govindaswami temple in the present case was a civil right and that the civil Court had jurisdiction. He relied on several decisions to be noticed presently. For the respondent, Mr. Narasimhan contended that there was no right to take any deity from the main temple to the Govindaswami temple, that there was no proof of the custom as pleaded and that the civil Court did not, therefore, have jurisdiction.

7. It is not in dispute that if the present right claimed by the plaintiffs can be characterised as a "ritual", then the plaintiffs cannot seek their reliefs in civil Court and they will have to go before the appropriate authorities constituted under the Tamil Nadu Religious and Charitable Endowments Act, 1959. The word 'ritual' means "pertaining or relating to, connected with, rites". The word 'rite' is "a formal procedure or act in a religious or other solemn observance". The question whether a right to carry the deity and worship it is a civil right or not has been examined in decisions of this Court.

8. In *Narayana Mudali* v. *Peria Kalathi Mudali*[1], the question relating to an observance known as Kappu Kattu has been dealt with. Kappu Kattu is a right whereby unmarried boys of a particular caste go through a sort of initiation which consists in the tying of a sacred string round the wrist as preparatory to their taking part along with others in the festival. In Sanskrit it is known as Raksha Bandan. The plaintiffs in the case before Wadsworth, J., claimed a right of Diparathana also which consisted in the making of offerings of cocoanut, betel and fruits to the God on the occasion of the festival with camphor also being burnt. The learned Judge held that the Courts will not endeavour to lay down a ritual which is to be followed in the worship. The position would, however, be different where there are perquisites attached to an office. On the facts of that particular case it was held, that Kappu Kattu was a ritual which could not be the subject-matter of a civil suit. As far as Deeparathana also was concerned, it was held, there was no difference. The civil Court was thus held to have no jurisdiction in determining such a question.

9. In *Gounders of Vilangathur Village represented by Velayudha Goundan and others* v. *Udayars of Vilangathur Village represented by Ponnuswami Udayar and others*[1], there was a dispute between the Vanniars or Goundars and the Udayars in a village called Vilangathur. Out of eighty houses, Vanniars live in about forty and the other communities including Udayars in the rest of them. There is a Perumal (Vishnu) temple in that village and there were two festivals, one in February-March and the other in August-September, every year. According to the Vannia or Goundar community, both the communities were offering worship in the temple and conducting the festivals. As Vanniars were denied their rights, they came forward with a suit in a civil Court. It was held by Somayya, J., that a suit by one set of villagers against an aggressive set of other villagers, who prevented the plaintiffs from peacefully carrying on the processions and worship of a deity in a temple did not fall within section 73 of the Madras Hindu Religious and Charitable Endowments Act, 1927 and that the right of an individual to worship in a particular form, as in the past, was a civil right. The plaintiffs were held to have been entitled to the protection of the Court in exercise of their civil right.

1. (1939) 1 M.L.J. 199: 49 L.W. 295: A.I.R. 1939 Mad. 494.
2. (1945) 1 M.L.J. 300: 58 L.W. 287: A.I.R. 1945 Mad. 234.

10. The difference between these two cases may be noticed. In the case before Wadsworth, J., it related to a ritual and in the case before Somayya, J., it related to worship. The right to worship has always been taken to be a civil right.

11. In *Ugam Singh* v. *Kesarimal*[1], the dispute was between the Swatambaries and Digambaries of Jain sect. The Swatambaries contended that they had a right to place the Chakshus, Dhwajadand or Kelash according to their right. The Digambaries, would not worship the idol which had Chakshus. The result would be, if Swatambaries were to have their right, the Digamberies would be excluded from the worship. It is in this connection that the question whether the right claimed by the respective sects was a civil right or not was gone into by the Supreme Court. It was held that a right to worship was a civil right interference with which raises a dispute of a civil nature though disputes which are in respect of rituals or ceremonies alone cannot be adjudicated by civil Courts if they were not essentially connected with civil rights of an individual or a sect on behalf of whom a suit is filed.

12. In *Sri Sinna Ramanuja Jeer* v. *Sri Ranga Ramanuja Jeer*[2], the dispute related to a right to first theertham in the Alwar Thirunagari Temple in Tirunelveli district. Subba Rao, J., as he then was, brought out the principles at page 516 in the following passages:

> "Section 9 of the Code of Civil Procedure describes the nature of suits which a Court has jurisdiction to entertain. It can entertain every suit of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. As a corollary

1. (1971) 1 M.L.J. 539.
2. (1962) 1 S.C.J. 17: (1962) 1 M.L.J. (S.C.) 1: (1962) 1 An.W.R. (S.C.) 1: (1962) 2 S.C.R. 509: A.I.R. 1961 S.C. 1720.

to this, it follows that a Court cannot entertain a suit which is not of a civil nature. *Prima facie* suits raising questions of religious rites and ceremonies only are not maintainable in a civil Court, for they do not deal with legal rights of parties. But the *explanation* to the section accepting the said undoubted position says that a suit in which the right to property or to an office is contested is a suit of civil nature notwithstanding that such right may depend entirely on the decision of a question as to religious rites or ceremonies. It implies two things, namely, (*i*) a suit for an office is a suit of a civil nature; and (*ii*) it does not cease to be one even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. It implies further that questions as to religious rites or ceremonies cannot independently of such a right form the subject-matter of a civil suit. Honours shown or precedence given to religious dignitaries when they attend religious ceremonies in a temple cannot be placed on a higher footing than the religious rites or ceremonies, for they are integral part of the said rites or ceremonies in the sense that the said honours are shown to persons partaking in the ceremonies."

13. In *V. Srinivasachariar* v. *Thatha Desika Thathachariar*[1], the Vadagalais alleged that according to tradition, it was an established custom and usage to take the idol of Sri Vedanta Desikar on his birthday round the shrines of Alwars and Acharyas and the verses composed by Sri Desikar both in Sanskrit and Tamil would be recited at the time of the Mangalasaganam in Varadarajaswami Temple at Kanjeevaram. The contesting defendants resisted the suit denying the custom and usage alleged by the plaintiff and stated that only Thenkalai mantrams, Prabandhams and Vazhi Thirunamam would be recited. The suit was also resisted as not being maintainable. The Court considered the decision in *Subbaraya Mudaliar* v. *Vedantachariar*[2], where it was pointed out that a right to recite sacred texts in a temple is a matter of ritual or ceremony in a religious matter with which a civil Court has nothing to do. But where the right to worship itself was denied, a suit to establish such an ordinary right would be a suit of a civil nature, so it was held in *Kadirvelu Chetty* v. *Nanjundaiyar*[1]. Following these decisions, it was held in the case, *V. Srinivasachariar* v. *Thatha Desika Thathachariar*[2], that what was claimed by way of recitation of verses of Vedanta Desikar pertained to ritual and so, the civil Court cannot go into it. At page 414 the learned Judge observed thus:

> "*Prima facie* suits raising questions of religious rites and ceremonies only, are not maintainable in civil Courts, for, they do not deal with the legal rights of parties. Even so *Explanation* to section 9 provides that a suit in which the right to property or to an office is contested is a suit of civil nature, notwithstanding that, such right may depend entirely on the decision of a question as to religious rites or ceremonies. Two aspects underlie the scheme of section 9, Civil Procedure Code. The first is, that a suit asserting a right to an office is a suit of a civil nature and the second is that it does not cease to be one of a civil nature even if the said right depends entirely upon a decision of a question as to the religious rites or ceremonies. There is a further implication that questions as to religious rites or ceremonies cannot *independently* (Italics added) of such a right to an office form the subject-matter of a civil suit".

14. Thus, the well established legal position is that suits relating to rites or rituals in a temple are not of a civil nature. However, the right to worship is a civil right which can be agitated in a civil Court. In the present case, the question is, whether to take the deity from the main temple to the Govindaswami Temple is a civil right or not.

15. The Yadavas who are Vaishnavas by persuation worshipped the deity Vishnu. The idea behind this festival is to have this deity worshipped in their own temple *viz.*, Govindaswami temple. Taking of a deity from one temple to another cannot be classified as a

1. (1970) 83 L.W. 407.
2. (1905) I.L.R. 28 Mad. 23: 14 M.L.J. 171.

1. (1916) 2 L.W. 512.
2. (1970) 83 L.W. 407.

ritual. Transporting a deity is not doing anything to the deity as such. There is no ritual in carrying the deity. The worship is to be done at the other place *viz.*, at Govindaswami temple. It is this right to worship which was not granted by the defendant and so the plaintiffs had to agitate the matter in a civil Court. As seen earlier, a right to worship is a civil right and the civil Courts have jurisdiction to adjudicate on it.

16. The learned counsel for the respondent pointed out that there was no unconditional right available to the plaintiffs or their community and that the matter had not been considered as a matter of right much less a customary right. Usage and custom are not synonymous and they must be distinguished. Usage, when it has force of law, ripens into a customs. See *Srinivasachariar* v. *Thatha Desika Thathachariar*[1]. The essentials of a custom are that it should be ancient or of remote antiquity or long established, certain, invariable uniform and continuous and reasonable and not open to objection on the ground of public policy or otherwise and not opposed to statute. The custom to be valid must also be obligatory or compulsory in the sense that it must not be in the option of any person whether he would conform to it or not *See* P. R. Ganapathi Iyer's Treatise on Hindu Law, 1915, Edition at page 321 and *Srinivasachariar* v. *Thatha Desika Thathachariar*[1].

17. In the present case, the customary right claimed is contested on the ground that there have been some breaks in some years and that only an payment of Re. 1, the deity is allowed to be taken so that it cannot be construed to be unconditional and absolute. The pre-requisite of the payment of Re. 1 before the deity is taken is part of the customary right and cannot be divorced from it. It is not clear as to why this payment of a nominal amount is insisted upon. But, on this payment, the plaintiffs' community has been allowed to take the deity to their temple for a long period. This customary right was not exercised in certain years because of a dispute that the amount had not been paid in time. When the exercise of a right is conditional on a payment and the payment cannot be divorced from the right, then, if the payment was not made, the temple authorities would be justified in not permitting the deity to be carried out. After all, a customary right has to be exercised with all its obligations too. This does not, however, mean that the temple authorities can refuse to receive the amount and prevent the plaintiffs community from exercising the right. Having considered the nature of the custom in the present case, I am satisfied that it fulfils all the requisites which are considered in the context of a valid custom.

1. (1970) 83 L.W. 407 at 416.

18. The question whether when there is a break or gap in the exercise of a right it would justify the denial of the right itself has come up for consideration in *K. A. Srinivasa Ayyangar* v. *S. Ramanujachariar*[1]. In that case, the Thengalais had a right to conduct certain festivals in a temple upto 1909. The Vadagalais exercised such a right from 1910 to 1914. In 1914 when the Thengalais wanted to exercise their right to conduct the festival, there was an order under section 144 of the Code of Criminal Procedure from 1914 to 1927 and neither side conducted the festival. On 3rd January, 1930, a suit was filed by the Thengalais for a declaration that an order under section 144 of the Code of Criminal Procedure, which the Vadagalais had obtained, was illegal and that the Vadagalais were not entitled to exercise any right in connection with the temple in Thirukkannamangai in Tanjore District. It was held that the interference by the Vadagalais with the right of the Thengalais to hold the festival not having been sufficiently long to give the Vadagalais any title, and the infringement being a recurring infringement, the Thengalais did not lose their right merely because they did not institute a suit in respect of the first infringement. Similarly, in the present case, the gap did not result in the lapse of their right by the Yadavas.

19. Taking into account the facts here, I hold that the plaintiffs have established a customary right to worship the deity by tak-

1. (1941) 1 M.L.J. 322: 53 L.W. 315: I.L.R. (1941) Mad. 544: A.I.R. 1941 Mad. 498.

ing it from the main temple to the Govindaswami temple on the tenth day of Chitrai festival. As the matter pertains to a civil right, the plaintiffs will have a declaration and the other prayers incidental to this declaration which have been asked for in the plaint will have to follow. The trial Court rightly granted the decree and the lower appellate Court was not justified in reversing the judgment of the trial Court. The second appeal is accordingly allowed, but, in the circumstances, nor order as to costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

T. R. Srinivasa Chetty .. *Petitioner**

v.

G. Nagarajan and another .. *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960) *(as amended by Act XXIII of* 1973), *section* 10 (2) (iii) (a)—*Subletting by tenant—Essential requirements.*

(B) *Transfer of Property Act (IV of* 1882), *section* 105—*'Lease' or 'licence'—Distinction.*

Held: The question whether a transaction is a lease or licence will have to be ascertained from the intention of the parties and the nature of possession granted. The following circumstances present in the instant case establish the transaction is a lease:—

1. The second respondent in the civil revision petition was entitled to exclusive possession of the premises facing Godown Street in which he was carrying on business in partnership with other partners;

2. The civil revision petitioner herein had no manner of right in the business carried on in the portion of the premises facing Godown Street;

3. The civil revision petitioner had got an exclusive entrance for the portion of the premises occupied by him and he had no access to the portion of the premises occupied by the second respondent;

4. The portion occupied by the second respondent was provided with a sub-meter for electricity;

5. The monthly payment though termed as compensation and commission payable by the second respondent to the civil revision petitioner was in reality rent for the premises occupied by the second respondent;

6. The demise was for a fixed term of five years;

7. No power was reserved for the civil revision petitioner to cancel the contract before the expiry of the fixed term;

8. Provision was also made for extending the term of the contract by mutual agreement;

9. Penal provisions were incorporated providing for enhanced payment of rent in case the second respondent continued after the term of five of years.

All these facts clearly go to show that what was demised is an interest in immovable property and not a mere licence. [*Para.* 15.]

Cases referred to:—

Nina Ghosh v. *Daultras Arora,* 71 Cal.W.N. 270: A.I.R. 1967 Cal. 633; *Besant Singh* v. *Cantonment Executive Officer,* A.I.R. 1960 J. & K. 83; *Delhi Simla Catholic Archdiocese* v. *State of Uttar Pradesh,* A. I. R. 1976 Delhi 251; *Sohan Lal Naraindas* v. *Laxmidas Raghunath Gadit,* (1971) 3 S. C. R. 319; *Kidar Nath* v. *Swami Parshad,* A.I.R. 1978 Punj. & Har. 204; *Balvantsinghji Anand* v. *Bhagwantrao Ganpatrao Deshmukh,* A.I.R. 1980 Bom. 333; *Chandu Lal* v. *Municipal Corporation of Delhi,* A. I. R. 1978 Delhi 174; *Qudran Ullah* v. *Municipal Board,* (1974) 1 S.C.C. 202: (1974) 2 S. C. R. 530: A.I.R. 1974 S.C. 396; *S. Rajalakshmi Dyeing Works* v. *Rengaswamy Chettiar,* A.I.R. 1980 S. C. 1253; *Dattanpat Gopal rao* v. *Vithalrao Marutirao,* (1975) 2 S.C.C. 246: A.I.R. 1975 S.C. 1111.

Petition under section 25 of the Rent Control Act (XVIII of 1960) (as amended by Act

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*C.R.P. No. 2957 of 1979. *4th September,* 1981.

XXIII of 1973), praying the High Court to revise the Order of the Court of Small Causes (III Judge) Madras dated 14th November, 1979 and made in H.R.A. No. 179 of 1979 (H.R.C. No. 2519 of 1976) on the file of the Court of Small Causes (6th Judge) Madras.

A. Subramania Iyer and *Kalanithi,* for Petitioner.

V. Nataraj and *M. S. Srinivasan,* for Respondents.

The Court delivered the following

JUDGMENT.—The civil revision petitioner is the tenant in respect of the premises bearing door No. 1|40, Godown Street, George Town, Madras against whom an order of eviction was passed by the third Judge, Court of Small Causes, Madras in H.R.A. No. 179 of 1979, on the ground of subletting. The landlord, the first respondent herein, initially filed H.R.C. No. 2519 of 1976, on the file of the Court of Small Causes, Madras against the civil revision petitioner herein and the second respondent herein for eviction under section 10 (2) (*ii*) (*a*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act) of the abovesaid premises let out to the civil revision petitioner for carrying on tobacco business only. The case of the landlord is that in the middle of the month of May, 1976, without the knowledge or consent of the landlord the tenant, the civil revision petitioner carried out extensive structural alterations to the portion in his occupation by demolishing certain walls and removing doors and windows and the said act committed by the tenant amounted to an act of waste resulting in damage to the building and also endangering the safety of the building and impairing the material utility and value of the building. The landlord also alleged that the civil revision petitioner had sublet the portion let out to him to the second respondent herein without the knowledge and consent of the landlord, the first respondent herein. The landlord sought the eviction of the civil revision petitioner on both the abovesaid grounds.

2. The learned Rent Controller after going through the evidence in this case found that there is no proof to show that the tenant had caused damage by way of alterations and other acts of waste to the petition-mentioned premises as alleged by the landlord. On the second ground of sub-letting the learned Rent Controller came to the conclusion that the tenant had sub-let the premises to the second respondent herein and ordered eviction of the civil revision petitioner under section 10 (2) (*ii*) (*a*) of the Act. As against the orders of the learned Rent Controller the tenant filed an appeal to the Third Judge of the Court of Small Causes, Madras in H.R.A. No. 179 of 1979. The appellate authority also concurred with the findings of the learned Rent Controller and dismissed the appeal. As against the order of dismissal by the appellate authority this civil revision petition has been filed by the tenant.

3. It is urged on behalf of the civil revision petitioner that the appellate authority erred in coming to the conclusion that the second respondent herein is a sub-tenant when actually he is only a licencee. The case of the civil revision petitioner is that according to the terms of Exhibit R-3 under which the second respondent was inducted into the possession of the petition-mentioned premises the transaction can only be said to be a licence in favour of the second respondent herein and not a lease which will amount to subletting the premises to the second respondent herein. On the other hand the case of the landlord is that the terms of Exhibit R-3 coupled with the other circumstances would indicate that the civil revision petitioner has sublet the premises to the second respondent herein.

4. In order to arrive at a conclusion whether the transaction under Exhibit R-3 will amount to a lease or licence the relevant terms of Exhibit R-3 will have to be referred to. The civil revision petitioner, who is the tenant, is referred to as the party of the first part and the second respondent herein is referred to as the party of the second part in the under-mentioned clauses of Exhibit R-3. The agreement Exhibit R-3 contains 17 clauses which are reproduced below:—

"(1) The party of the first part offers to permit the party of the second part to occupy the portion of the godown at No. 40|41, Godown Street, Madras-1, under leave and licence. A sum of Rs. 300 per month shall be paid as compensation for the leave and licence granted to the party

of the second part by the party of the first part.

(2) The party of the first part will work for the party of the second part on commission for securing the business of the party of the second part. A fixed commission of Rs. 700 per mensem is payable every month by the party of the second part to the party of the first part.

(3) The party of the second part has agreed to pay and hereby pays Rs. 50,000 as deposit to the party of the first part, the receipt of which sum of Rupees fifty thousand only in cash is hereby acknowledged by the party of the first part.

(4) The leave and licence is for 60 months. The compensation for leave and licence of Rs. 300 per mensem shall be paid in cash by the party of the first part, but Rs. 700 per mensem representing the commission alone shall be deducted and adjusted from and out of the said deposit of Rs. 50,000 paid this day.

(5) The deposit of Rs. 50,000 will not carry any interest.

(6) This sum of Rs. 50,000 is to be adjusted in the manner set out in clause (4) above and is not liable to be refunded to the party of the second part on any account except as stated in clauses (10) and (17).

(7) The party of the first part will have no claim on the business or assets of the party of the second part except the claim of Rs. 700 and Rs. 300 per mensem mentioned in clause (4) supra.

(8) It is hereby agreed between the parties that the party of the first part shall not have or raise any manner of claim or right over the goodwill of the party of the second part, and the party of the first part shall have no claim, right or title to claim anything with reference to the goodwill of the party of the second part.

(9) This agreement is deemed to commence from 6th May, 1976, as the agreement is executed today.

(10) If for any reason the party of the second part is obliged to vacate for no fault of his before the expiry of 5 years, the party of the first part is liable to refund the balance amount lying to the credit of the party of the second part immediately and in default of such refund, it will carry interest at 18 per cent. per annum.

(11) The party of the first part hereby undertakes to be regular in payment of rent to his landlord and shall not commit any default or suffer any collusive order of eviction to evict the party of the second part at any time.

(12) If the party of the second part continues to occupy the godown beyond the period of five years, the party of the second part shall be liable to pay twice the fixed commission *i.e.*, Rs. 1,400 per mensem to the party of the first part.

(13) If both parties agree to extend the period of leave and licence beyond 5 years, then the period may be extended on such terms and conditions to be agreed upon between the parties.

(14) The party of the first part hereby undertakes not to cause any obstruction to the cloth business to be conducted by the party of the second part in the godown described below.

(15) The party of the second part will have a sub-meter provided for his portion at his cost.

(16) The party of the second part shall effect the repairs, white-washing, etc., to the portion under his occupation.

(17) If for any reason, the party of the second part is forced to vacate under the process of law, then the party of the first part will be liable to refund whatever the balance of deposit lying with the party of the first part after adjusting all the amounts due by the party of the second part".

Bearing in mind the above clauses and the other surrounding circumstances we will have to come to a conclusion whether the transaction amounts to a lease or licence. Lease is defined under section 105 of the Transfer of Property Act, as follows:—

"A lease of immovable property is a transfer of a right to enjoy such property made for a certain time, express or implied or in perpetuity, in consideration of a price paid or

promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent".

Licence is defined under section 52 of the Indian Easements Act, 1882, as follows:—

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence".

5. In the light of the above said definitions it is seen that if an interest in an immovable property entitling the transferor to enjoyment, is created, it is a lease. If permission to use the property without right to exclusive possession of the property is granted it is said to be a licence. The relevant paragraphs from Halsbury's Laws of England, Volume 23, dealing with lease and licence also throws light on the subject. The following are the relevant paragraphs:—

"1022. *Principles for determining whether agreement creates lease or licence.*—In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licencee the decisive consideration is the intention of the parties. The parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is to be deemed a licence or describing it as such; the relationship of the parties is determined by law on a consideration of all relevant provisions of the agreement; nor will the employment of words appropriate to a lease prevent the agreement from conferring a licence only if from the whole document it appears that it was intended merely to confer a licence. In the absence of any formal document the intention of the parties must be inferred from the circumstances and the conduct of the parties.

1023. *Nature of grant of exclusive possession.*—The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy, but it is a consideration of the first importance.

In deciding whether a grantee is entitled to exclusive possession regard must be had to the substance of the agreement. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee requires that he should have exclusive possession.

The grant of an exclusive right to a benefit can, however, be inferred only from language which is clear and explicit. If an exclusive right of possession is subject to certain reservations or to a restriction of the purposes for which the premises may be used, the reservations or restriction will not necessarily prevent the grant operating as a lease.

1024. *When Grant conferring Exclusive Possession operates merely as licence.*—A grant which confers the right to exclusive possession may operate as a licence in the following circumstances which negative the intention to create a lease. A requisitioning authority which has no estate or interest in the land cannot grant a lease, and any grant by the authority can only take effect as a licence. A deserted wife is entitled to exclusive possession of the matrimonial home and cannot be evicted by her husband or persons claiming under or through the husband with knowledge of the wife's rights, but her right is a mere licence or equity and does not amount to an equitable estate or interest. A family arrangement may include an irrevocable grant of the right to exclusive possession but the grantee may nevertheless be a licencee and not a tenant and cannot acquire title based on adverse possession. A person may be allowed temporary rights of exclusive possession to alleviate hardship or for other reasons which negative the intention to create a tenancy which would

confer on the grantee a permanent right of occupation under the Rent Restriction Acts and in these circumstances the grant may be construed as a licence. Where, however, a purchaser is allowed into possession pending completion, it seems that the purchaser is normally a tenant at will and not a licensee.

1025. *Instance of agreements creating licences.*—A licence is normally created where a person granted the right to use premises without becoming entitled to exclusive possession thereof, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the possession and control of the owner, the agreement will operate as a licence, even though the agreement may employ words appropriate to a lease".

With this factual and legal background we will have to examine the clauses in Exhibit R-3 and ascertain the intention of the parties to the transaction and come to a conclusion whether the transaction amounts to a lease or licence. It is urged on behalf of the tenant, the civil revision petitioner, that merely from the fact that the possession was delivered to the second respondent herein it cannot be said that the transaction is a lease. Relying upon the decision reported in *Nina Ghosh* v. *Daultras Arora and others*[1], it is urged on behalf of the civil revision petitioner that the distinction between a lease and licence, in spite and irrespective of exclusive possession of the grantee under the particular document, turns on the actual intention of the parties. Reliance is also placed on behalf of the civil revision petitioner on the case in *Besant Singh* v. *Cantonment Executive Officer, Jammu*[2], where the following observation is found:

"The view expressed in some of the earlier decisions that the test whether exclusive possession has been granted or not will be decisive in determining whether the grant is a lease or a licence does not appear to have been adhered to in more recent decisions which have pointed out that the real test for ascertaining the true nature and character of the transaction is the intention of the parties".

My attention is also drawn by the civil revision petitioner to a case decided by a single Judge of the Delhi High Court reported in *Delhi Simla Catholic Archdiocese* v. *State of Uttar Pradesh and others*[1], where the following observation is found:

"It is no doubt true that the mere fact of a person being in exclusive possession would not be conclusive in favour of the some being a lease because there may be other circumstances which may still negative the inference of a lease to indicate the same being only a licence".

My attention is also drawn to a passage in Easements and Licences by B. B. Katiyar (9th Edition at page 834), which is as follows:

"The following propositions are well-established:

(1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form:

(2) The real test is the intention of the parties whether they intended to create a lease or a licence;

(3) If the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property of which the legal possession continues with the owner, it is a licence; and

(4) If under the document a party gets exclusive possession of the property, *prima facie* he is considered, to be a tenant; but circumstances may be established which negative the intention to create a lease".

6. The contention on behalf of the civil revision petitioner in this case is though exclusive possession is granted to the second respondent herein yet if the entire circumstances

1. 77 Cal.W.N. 270: A.I.R. 1967 Cal. 633.

2. A.I.R. 1960 J. & K. 83.

1. A.I.R. 1976 Delhi 251.

and the recitals in Exhibit R-3 are taken into consideration the transaction can only be said to be a licence and not a lease. On the other hand the contention of the landlord, the first respondent herein, is that Exhibit R-3 is camouflage to hide the sub-letting by the civil revision petitioner and that the word "licences" is used in Exhibit R-3 only as a cloak to hide the sub-letting by the civil revision petitioner. The following terms of Exhibit R-3 are pointed out by the first respondent herein in support of his contention that the transaction is a lease and not a licence:—

1. According to Exhibit R-3 the civil revision petitioner is entitled to get a compensation of Rs. 300 per month together with a fixed commission of Rs. 700 per month totalling Rs. 1,000. This arrangement is only a device to get a rent of Rs. 1,000 per month from the sub-tenant;

2. The fixed commission of Rs. 700 payable to the civil revision petitioner is not fixed with reference to any turnover and as such it cannot be called as a commission. The civil revision petitioner had not filed any document to show that he had done any work for the second respondent;

3. As per clauses (5) and (6) the second respondent deposited a sum of Rs. 50,000 with the civil revision petitioner free of interest and that the commission of Rs. 700 per month is to be adjusted from out of the sum of Rs. 50,000 makes the case of the civil revision petitioner that he is only a licensee improbable as no licensee will deposit such a heavy sum of Rs. 50,000, losing interest on the same.

4. The term of the contract is said to be five years according to clause (4) of Exhibit R-3. A licence is terminable at any time and the term of five years fixed in Exhibit R-3 indicates that the transaction is a lease;

5. Clause (6) of Exhibit R-3 provides that a sum of Rs. 50,000 paid by the second respondent herein to the civil revision petitioner is not liable to be returned to the second respondent herein but the same is to be adjusted towards of the commission of Rs. 700 payable to the civil revision petitioner as per Exhibit R-3. This arrangement also indicates that the sum of Rs. 50,000 was paid to the civil revision petitioner as an interest free advance from which the amounts payable to the civil revision petitioner as per Exhibit R-3 is to be adjusted. This arrangement also probablises the case of the first respondent herein that the arrangement is a lease and not a licence;

6. Clause (7) of the agreement Exhibit R-3 provides that the civil revision petitioner will have no claim in respect of the business carried on in the premises in the occupation of the second respondent herein. If the case of the civil revision petitioner that the transaction is only a licence, is true then in the natural course of the things the assets of the business will continue to vest with the civil revision petitioner;

7. It is also provided as per clause (8) of Exhibit R-3, the civil revision petitioner shall not claim any manner of right over the goodwill of the business carried on by the second respondent which indicates that the civil revision petitioner has no manner of right in the business. This again indicates that the transaction is a lease and not a licence;

8. As per clause (10) of Exhibit R-3 it is seen that if for any reason the second respondent is obliged to vacate the premises before the expiry of five years the civil revision petitioner is liable to refund the balance amount out of the deposit of Rs. 50,000 and in default of such refund the civil revision petitioner is bound to pay interest at 18 per cent. per annum. This clause indicates that the deposit of Rs. 50,000 made by the second respondent to the civil revision petitioner is made only as an advance to ensure the payment of rent;

9. Clause (12) of Exhibit R-3 provides that if the second respondent herein continues to occupy the premises beyond the period of 5 years he is liable to pay Rs. 1,400 per month to the civil revision petitioner. This stipulation is not in conformity with the case of the civil revision petitioner that the transaction is only a licence;

10. Clause (13) of Exhibit R-3 provides for extension of the term of five years probablising the fact that Exhibit R-3 is a lease;

11. Clause (15) of Exhibit R-3 provides that the second respondent should have a sub-meter erected for his portion. This clause also indicates that the transaction is a lease;

12. Clause (17) of Exhibit R-3 provides that in case the second respondent herein is forced to vacate under the process of law then the civil revision petitioner is liable to refund the balance of deposit out of Rs. 50,000 deposited by the second respondent herein to the second respondent herein. This clause indicates that there is an apprehension on the part of the parties to the transaction that the landlord may take proceedings for eviction on the ground of sub-letting.

7. The above said clauses in Exhibit R-3 will have to be considered along with certain circumstances existing in this case and brought out in the evidence before the Rent Controller.

8. The first circumstance that will have to be considered is the user of the premises by the second respondent herein. According to the evidence let in the premises has got two openings, one in Godown street and the other in Audiappa Naicken Street. The portion facing Audiappa Naicken Street is having door No. 7|8 and the portion facing Godown Street is having door No. 40|41. The portion used by the second respondent herein is the portion bearing door No. 40|41, Godown Street. It is in evidence that alterations have been made to the portion facing Godown Street and the civil revision petitioner will not be in a position to enter the portion facing the Godown Street, occupied by the second respondent herein. Similarly the second respondent herein will not have any access to the portion occupied by the civil revision petitioner facing Audiappa Naicken Street and bearing door No. 7|8.

9. The second circumstance that will have to be considered is that the business purported to have been carried on by the civil revision petitioner in the portion facing Audiappa Naicken Street is the business in tobacco and the second respondent herein is carrying on the business in textiles in the portion facing Godown Street in partnership with others. It is also in evidence that the civil revision petitioner is not a partner in the textile business carried on in the portion facing Godown Street.

10. The third circumstances, which is relevant for the purpose of this enquiry is the textile business carried on by the second respondent herein known as "64 Textiles" is a partnership firm with five partners of whom the second respondent is one. The civil revision petitioner has no manner of right in the above said textile business.

11. The fourth circumstances relevant for consideration is the fact that the civil revision petitioner had passed receipts for the payment of Rs. 300 per month to the second respondent herein as evidenced by Exhibits P-4 to P-32. There receipts are printed receipts with the title "குடக்கூலி ரசீது". P.W. 2, the clerk of the second respondent herein, had produced these receipts and had given evidence that the second respondent herein used to pay rent to the civil revision petitioner and that the civil revision petitioner issued the receipts Exhibits P-4 to P-32 evidencing the payment of rent. The evidence of P.W. 2 is attacked by the civil revision petitioner on the ground that there is collusion between the second and the first respondents herein. But it is seen that P.W. 2 had attended Court in pursuance of the summons taken out by the first respondent herein, and that apart from producing the documents Exhibits P-4 to P-32, D.W. 2 had not given any evidence probablising collusion between the second and the first respondents herein. The rent receipts issued by the civil revision petitioner to the second respondent herein is duly proved by P.W. 2 and this circumstance also indicates that the transaction is a lease and not a licence.

12. The fifth circumstance that will have to be considered is the conduct of the civil revision petitioner in putting forth his case at several stages of the proceedings. Initially the first respondent issued a notice to the second respondent stating that he had sublet the premises as per the office copy of the registered notice Exhibit P-1, dated 25th May, 1976. The said notice was received by the

civil revision petitioner on 27th May, 1976 as per the postal acknowledgment Exhibit P-2. The civil revision petitioner had not issued any reply to this notice. Though the civil revision petitioner who was examined as R.W. 1 before the Rent Controller states that he had issued a reply to Exhibit P-1, the reply notice is not forthcoming. In the absence of the production of reply notice we have to take it that no reply is given by the civil revision petitioner to the notice Exhibit P-1. The allegation of the first respondent herein made in Exhibit P-1, that the premises was sublet by the civil revision petitioner would not have gone without a denial by the civil revision petitioner if the case of the civil revision petitioner is true. In the counter-statement filed before the Rent Controller in answer to the plea of the first respondent herein that the civil revision petitioner has sublet the premises the civil revision petitioner stated that himself and the second respondent herein are conducting a partnership business in the premises. In the evidence before the Rent Controller, the civil revision petitioner, R.W. 1 goes to the extent of saying that there is a partnership deed executed on a stamp paper but no steps have been taken to produce the partnership deed. During the course of the evidence the civil revision petitioner had put forward a different case that the second respondent is only a licencee under the first respondent. The conflicting pleas of the civil revision petitioner during the several stages of the proceedings make the case of the civil revision petitioner unbelievable.

13. In addition to the above said circumstances the clerk of the second respondent herein, who was examined as P.W. 2 deposed that no commission was paid and he also says that exclusive possession of the premises facing Godown Street was given to the second respondent and that the civil revision petitioner enters the premises facing Audiappa Naicken Street through a different entrance. All these circumstances probablise the fact that what was intended under Exhibit R-3 is only a lease and not a licence. In the case reported in *Sohan Lal Naraindas* v. *Laxmidas Raghunath Gadit*[1], the Supreme Court in dealing with the difference between a lease and hence observed as follows:

"Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument in intended to create or not to create an interest in the property the subject-matter of the agreement. If it is in fact intended to create an interest in the property it is a lease; if it does not, it is a licence. In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance."

In the case reported in *Kidar Nath* v. *Swami Purshad and others*[1], a single Judge of the Punjab High Court observed as follows:

"It is clear that the exclusive possession of the premises was given to the appellant and he was required to pay a monthly rent of Rs. 50 though described as licence-fee. It is in the statement of the appellant himself as D.W. 9, that machinery for the purpose of manufacturing hosiery goods had been installed by him in the said premises and that electric meter was also in his name, In the present case the circumstance that the appellant was allowed to have the electric meter and the electric connection of the premises in his own name, gives a clear indication of the real intention of the parties that the appellant was to be on the premises as a tenant and a lessee."

In the case reported in *Balavantsingji Anand* v. *Bhagwantrao Ganpatrao Deshmukh*[2], a single Judge of the Bombay High Court had occasion to consider the provision in the deed that the grantor shall at all times as of right and without interference or objections be entitled to enter and visit the portion of the land granted. Such a provision unmistakably

1. (1971) 3 S.C.R. 319.

1. A.I.R. 1978 Punj. & Har. 204.
2. A.I.R. 1980 Bom. 333.

postulates that the grantor is not in possession of the land and that is the reason that he has himself reserved the right to enter the land or to visit the land. Right of entering or right to visit is something far different from possession in respect of the land. As a matter of fact even in the case of a lease the landlord does have a right to visit the premises in question. In the case reported in *Chandu Lal* v. *Municipal Corporation of Delhi*[1], a Full Bench of the Delhi High Court in the course of the judgment dealing with the right of parties with reference to kiosk auctioned out by the Delhi Municipality observed as follows:—

> "The question accordingly is whether the various clauses of the document in question, when read as a whole, in any manner carve out an interest in the demised property in favour of the petitioners. Although a person who is let into exclusive possession is *prima facie* to be considered a tenant, nevertheless if the circumstances negative such a conclusion and show that no tenancy was created, the person in possession would not be held to be a tenant. It is trite saying that the intention of the parties is the real test for ascertaining the character of a document. It is beyond challenge that if a document gives only a right to use the property in a particular way but its possession and control remains with the owner thereof, it will be a licence. In such a case the legal possession remains with the owner of the property, the licensee being permitted to make use of the property for a particular purpose. It would, therefore, be seen that but for the permission the licensee's possession would be unlawful. Exclusive possession does not militate against the concept of a licence, if the circumstances negative any intention to create a tenancy."

Relying on the above decision it is contended on behalf of the civil revision petitioner that the exclusive possession of the premises facing Godown Street will not militate against the case of a licence set up by the civil revision petitioner. But in the above said case it is seen that the possession and control of the premises remained with the owner. In the present case the evidence goes to show that the civil revision petitioner did not have the possession and control of the premises with him. Hence the principle laid down in the Full Bench decision of the Delhi High Court cannot be applied to the facts of the present case.

1. A.I.R. 1978 Delhi 174.

14. The case reported in *Qudrat Ullah* v. *Municipal Board, Bareilly*[1], is relied on by the first respondent herein in support of his case that the transaction in question is a lease. In that case in pursuance of an agreement with the municipality evidenced by a deed where a person is allowed to collect the rents and bazar dues from sheds and shops and the internal roads within the market, the deed was held to be a lease deed and not a mere licence. The Supreme Court held that the bazar dues constitute a benefit arising out of the land and may be immovable property which can be leased out.

15. Bearing in mind the principles laid down in the above-said decisions if we examine the facts of the present case, a conclusion will have to be arrived at from the following circumstances present in this case:—

1. The second respondent in the civil revision petition is entitled to exclusive possession of the premises facing Godown Street in which he is carrying on business in partnership with other partners;

2. The civil revision petitioner herein has no manner of right in the business carried on in the portion of the premises, facing Godown Street;

3. The civil revision petitioner has got an exclusive entrance for the portion of the premises occupied by him and he has no access to the portion of the premises occupied by the second respondent;

4. The portion occupied by the second respondent herein is provided with a submeter;

5. The monthly payment though termed as compensation and commission as per Exhibit R-3 payable by the second respondent to the civil revision petitioner is in reality the rent for the premises occupied by the second respondent;

1. (1974) 1 S.C.C. 202: (1974) 2 S.C.R. 530: A.I.R. 1974 S.C. 396.

6. The demise is for a fixed term of five years;

7. No power is reserved for the civil revision petitioner to cancel the contract before the fixed term expired;

8. Provision is also made for extending the term of the contract by mutual agreement;

9. Penal provisions are incorporated in Exhibit R-3 providing for enhanced payment in case the second respondent continues after the term of five years.

All these facts clearly go to show that what was demised as per Exhibit R-3 is an interest in immovable property and not a mere licence as contended by the civil revision petitioner.

16. The word "licence" is used in Exhibit R-3 only as a camouflage and in order to escape the consequences of subletting if possible. The terms of Exhibit R-3 and the several circumstances pointed out, in the above discussion clearly indicate that the second respondent is only a sub-tenant in respect of the portion of the premises facing Godown Street. It is evident that the civil revision petitioner had sublet a portion of the premises without the written consent of the landlord.

17. Both the Courts below had rendered a cuncurrent finding on fact that what was demised in Exhibit R-3 is an interest in immovable property by the civil revision petitioner in favour of the second respondent. The Supreme Court in the case reported in *S. Rajalakshmi Dyeing Works and others* v. *Rengaswamy Chettiar*[1], expressed the view that concurrent findings based on facts by both the Courts below cannot be interfered with by the High Court exercising jurisdiction under section 25. In the course of the judgment the Supreme Court observed as follows:—

"In fact it has to be noticed that under section 25 the High Court calls for and examines the record of the appellate authority in order to satisfy itself. The dominant idea conveyed by the incorporation of the words to satisfy "itself under section 25 appears to be that the power conferred on the High Court under section 25 is essentially a power of Superintendence. Therefore despite the wide language employed in section 25 the High Court quite obviously should not interfere with findings of fact merely because it does not agree with the finding of the subordinate authority. The power conferred on the High Court under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, may not be as narrow as the revisional power of the High Court under section 115 of the Code of Civil Procedure; but in the words of Untwalia, J., in *Dattonpant Gopalavarao* v. *Vithalrao Marutirao*[1]. It is not wide enough to make the High Court a second Court of first appeal".

18. The concurrent findings of both the Rent Controller and the Appellate Authority are correct. Under the circumstances no interference is called for in respect of the concurrent findings of both the Courts below. Hence the civil revision petition is dismissed. There will be no order as to costs. The tenant is given three months time to vacate.

R.S. ——— *Civil revision petition dismissed.*

1. A.I.R. 1980 S.C. 1253.

1. (1975) 2 S.C.C. 246: A.I.R. 1975 S.C. 1111.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan and V. Ratnam, JJ.*

M/s. Maheswari Metals and Metal Refinery, carrying on business in Metal, Minerals and Ores having its registered office at No. 10, Arcot Srinivasachari Street, Bangalore by Partner R. Marudhachalam .. *Appellant**

v.

Tamil Nadu Small Industries Corporation Limited, having its registered Office at No. 35/2, Woods Road, Madras-2, represented by its Managing Director .. *Respondent.*

(A) *Limitation Act (XXXVI of* 1963), *Article* 55—*Suit for recovery of loss resulting from re-sale consequent on breach of contract —Alleged breach of contract on 21st June,* 1967—*Suit filed on 10th June,* 1971 — *Suit held barred by limitation.*

(B) *Sale of Goods Act (III of* 1930), *section* 54—*Power to order re-sale, when arises.*

(C) *Civil Procedure Code (V of* 1908), *Order* 21, *rule* 2—*Forfeiture of earnest money and claim for damages—Agitating of the two reliefs in different actions—If barred by Order* 2, *rule* 2.

The respondent issued a tender notice on or about 6th April, 1967 inviting offers for the purchase of zinc dross and zinc ash available for sale with the respondent ex-Mettur Dam. One of the terms of the tender was that the tender should be accompanied by a deposit of Rs. 5,000 as earnest money with the condition that the same would be refunded to the unsuccessful tenderer within a reasonable time and that if the tenderer failed to adhere to the terms and conditions prescribed in the tender or backed out, when his tender was accepted, the deposit was liable to be forfeited as per clause (9) of the tender conditions. A further term was to the effect that in case the contractor failed to take delivery then also the deposit amount was liable to be forfeited and the material would be disposed of and the defaulting party will be held liable for the short-fall, if any. The appellant made an offer and the respondent made a counter offer to the appellant. The appellant accepted the counter offer on 11th May, 1967. Subsequently, according to the appellant, the respondent split up the contract purportedly acting under clause (4) of the tender-terms and informed the appellant that the contract had to be shared in equal proportion by the appellant along with another party. The appellant refused to share the contract with another by its letter, dated 21st June, 1967, and the respondent on the same date informed the appellant that if the latter went back on his contract, the earnest money deposit will be forfeited and a further claim for damages will be made against him. Therefore, the respondent wrote to the appellant on 30th June, 1967 stating that there was a breach of contract by the appellant by failing to lift the zinc dross and zinc ash and that the deposit of Rs. 5,000 stood forfeited. Thereafter, the appellant filed a suit O.S. No. 3216 of 1968 for the recovery of the deposit of Rs. 5,000. The respondent called for fresh tenders and sold the goods to another party at a loss. The respondent filed O.S. No. 7679 of 1971 on the 10th June, 1971 for the recovery of Rs. 34,291.58 from the appellant. O. S. No. 3216 of 1968 was dismissed and O.S. No. 7679 of 1971 was decreed. Against the dismissal of O.S. 3216 of 1968 and decree in O.S. No. 7679 of 1971, the appellant preferred App. No. 436 of 1976 and App. No. 24 of 1975 respectively. The appellant contended that O.S. No. 7679 of 1971 was barred by limitation inasmuch as the suit was laid more than three years after the breach of contract on 21st June, 1967, and that the suit was barred under Order 2, rule 2, Civil Procedure Code by reason of the failure to plead the loss resulting from the sale in the appellant's suit for recovery of the deposit money. The respondent relied on sections 22 and 23 of the Limitation Act, to submit that the suit was within time.

Held, There was no question of any continuing breach as contemplated in section 22 of the Limitation Act on the terms of the contract in the instant case, when the breach had taken place on 21st June, 1967 and the cause

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*A.S. No. 24 of 1975 and
A.S. No. 436 of 1976. *20th June,* 1980.

of action also accrued on that date. Section 23 contemplated suits for compensation for an act which did not give rise to a cause of action unless some specific injury actually resulted therefrom. In the present case, the breach of contract by itself afforded a cause of action for the suit and the respondent need not have waited for some other specific injury resulting therefrom. Therefore, sections 22 and 23 of the Limitation Act could have no application to the present case. [*Para.* 18.]

When once the cause of action for a suit had arisen on breach of contract, the running of time could not be arrested nor could such a cause of action be kept in a state of suspension as it were till such time as the damages were ascertained after a leisurely re-sale at the convenience of one of the parties. [*Para.* 18.]

The suit should have been filed within three years from 21st June, 1967, the date of breach and having been brought on 10th June, 1971, the claim of the respondent for damages against the appellant was barred by limitation. [*Para.* 18.]

It was certainly open to a person in the position of the respondent to agitate its claim for damages in separately constituted and independent actions as had been done in this case and not necessarily by way of set-off. There was thus no omission by the respondent to sue for all the reliefs without the leave of Court. [*Para.* 22.]

The power of re-sale under section 54 (2) of the Sale of Goods Act will arise, only if the property in the goods has passed to the buyer subject to the lien of the unpaid seller. Where the property in the goods has not passed to the buyer the seller has no right of resale under section 54 (2). [*Para.* 26.]

It is doubtful in the present case whether the requisites for the exercise of the right of resale as per the tender conditions such as notice to the unpaid seller were available at all. [*Para.* 26.]

In the circumstances of the present case, the respondent was not entitled statutorily nor even contractually to claim the difference between the price fetched on re-sale and that contracted for, but would be entitled, if at all, to claim as damages the difference between the contract price and the market price on the date of the breach. [*Para.* 26.]

Cases referred to:—

Maheswari Metals & Metal Refinery v. *The Madras State Small Industries Corporation Ltd.*, (1973) 1 M.L.J. 209: 86 L.W. 785: A.I.R. 1974 Mad. 39; *V. K. Kumaraswamy* v. *Karuppaswamy*, (1952) 2 M.L.J. 785: I.L.R. (1953) Mad. 488: 65 L.W. 1074: A.I.R. 1953 Mad. 380; *Bradely* v. *Newsom*, (1919) A.C. 16; *Soundararajan & Co. Ltd.* v. *K. P. A. T. Annamalai Nadar*, A.I.R. 1960 Mad. 480; *Rajagopal Naidu* v. *Aiyyaswamy Chettiar*, (1965) 2 M. L.J. 135: 78 L.W. 658: A. I. R. 1965 Mad. 532; *Meenakshinada Dikshatar* v. *Murugaya Nadar*, (1969) 1 M.L.J. 474: A. I.R. 1970 Mad. 391; *P. Venugopala Pillai* v. *Thirugnanavalli Ammal*, (1941) 2 M.L. J. 866: 54 L.W. 286: A.I.R. 1941 Mad. 847; *Nawbutt Pattak* v. *Mahesh Narayan Lal*, (1905) I.L.R. 32 Cal. 654; *Kathersa Rowther* v. *Abdul Rahim Sahib*, (1942) 2 M. L.J. 43: I.L.R. (1942) Mad. 836: 55 L. W. 407: A.I.R. 1942 Mad. 580; *Ameenammal* v. *Meenakshi*, (1920) 12 L.W. 173; *P. S. N. S. Ambalavana Chettiar & Co. Ltd.* v. *Express Newspapers Ltd.*, (1968) 2 S.C.J. 259: (1968) 2 M.L.J. (S.C.) 34: (1968) 2 An.W.R. (S.C.) 34: (1968) 2 S.C.R. 239: A.I.R. 1968 S.C. 741; *Gillet* v. *Hill*, (1949) All E.R. 871; *Fateh Chand* v. *Balkishan Das*, (1965) 2 S.C.J. 678: (1965) 2 An.W.R. (S.C.) 145: (1965) 2 M.L.J (S.C.) 145: (1965) 2 S.C.R. 221: A.I. R. 1965 S.C. 1405.

Appeal against the decrees of the City Civil Court, Madras, dated 10th July, 1973 and passed in Original Suit No. 7679 of 1971 and O.S. No. 3216 of 1968, respectively.

Vedantam Srinivasan and *T. Venkatanarasimhalu*, for Appellant.

K. Chandrasekaran, for Respondent.

The Judgment of the Court was delivered by

Ratnam, J.—These two appeals are at the instance of Maheswari Metals Refinery, a registered partnership firm, having its registered office in Bangalore and arise out of two suits, *viz.*, O.S. No. 7679 of 1971 and O. S. No. 3216 of 1968, on the file of the Fifth Assistant Judge, City Civil Court, Madras, wherein the appellant figured as the defendant

and as the plaintiff respectively. O.S. No. 3216 of 1968 was instituted by the appellant on 21st June, 1968 for the recovery of a sum of Rs. 5,000 with interest thereon at 6 per cent. per annum from the date of plaint till date of realisation and also for costs. O.S. No. 7679 of 1971 was instituted by the respondent herein on 10th June, 1971 against the appellant for the recovery of a sum of Rs. 34,291.58 stated to be the loss that has been sustained by the respondent as a result of breach committed by the appellant, of a contract entered into by the appellant with the respondent. The appellant as stated already is a registered partnership firm carrying on business at Bangalore, while the respondent is Tamil Nadu Small Industries Corporation Limited, which is a company wholly owned by the Government of Tamil Nadu and incorporated under the Companies Act, 1956. On or about 6th April, 1967, the respondent issued a tender notice inviting offers for the purchase of zinc dross and zinc ash available for sale with the respondent ex-Mettur Dam. Amongst others one of the terms of the tender notice was that the price to be offered by the intending purchaser should be on the basis of 1,000 kilograms ex-Mettur Dam, without packing, sales-tax and other taxes being extra. Yet another term was that the tender should be accompanied by a deposit of Rs. 5,000 as earnest money with the condition that the same would be refunded to the unsuccessful tenderer within reasonable time and that if the tenderer failed to adhere to the terms and conditions prescribed in the tender or backed out when his tender was accepted, the deposit was liable to be forfeited as per clause 9 of the tender conditions. A further term was to the effect that in the event of the contractor failing to take delivery then also the deposit amount was liable to be forfeited as a penalty and the material would be disposed of and the defaulting party will be held liable for the shortfall, if any. On 24th April, 1967, according to the appellant it made an offer for the purchase of zinc dross at Rs. 2,705 per metric tonne. There was according to the appellant on 9th May, 1967 a counter-offer made by the respondent for the entire zinc dross and zinc ash at Rs. 2,715 and Rs. 1,225 per metric tonne respectively for the period from 1st April, 1967 to 31st March, 1968, but there was no stipulation that the contract was likely to be split up or that the respondent was at liberty to give it to any other person of its choice. The appellant complained that after the counter-offer made by the respondent was accepted by the appellant and confirmed, the respondent split up the contract and informed the appellant, by letter, dated 31st May, 1967, that the contract has to be shared by the appellant along with another party. Thereafter, the appellant wrote to the respondent pointing out that there was no stipulation or right reserved to the respondent to split up the contract and that the appellant would not share the contract with anyone else. By letter, dated 30th June, 1967, addressed to the appellant, the respondents stated that there was a breach of contract by the appellant and that the deposit amount of Rs. 5,000 stood forfeited and also called upon the appellant to show cause against the forfeiture. This was replied to by the appellant by its lawyer notice, dated 1st July, 1967 informing the respondent that the respondent had committed breach and that the sum of Rs. 5,000 could not be forfeited and demanded a refund of the sum of Rs. 5,000 from the respondent. A reply was sent by the respondent refusing to return the sum of Rs. 5,000. The appellant therefore, laid the suit for the recovery of a sum of Rs. 5,000 with interest at 6 per cent. per annum from the date of suit till the date of realisation on the ground that even if there was a breach, the respondent, had no right to forfeit the earnest deposit as the only remedy of the respondent is to sue for damages actually suffered by it.

2. By its written statement, dated 17th September, 1968, the respondent, while admitting the issue of a tender notice, disputed the correctness of the terms and conditions of the said tender as mentioned in the plaint. According to the respondent under clause (4) of the tender terms the Managing Director of the respondent-Corporation had the right to reject any tender and also to split up the tender as he deemed fit. The counter-offer, reference to which was made by the appellant in the plaint, was admitted by the respondent and it was the further case of the respondent that the appellant accepted the offer made by the respondent by letter, dated 11th May, 1967. The counter-offer by the

respondent and the splitting up of the tender was done, according to the respondent, under clause (4) of the tender terms which empowered the splitting up of the tender and therefore, the respondent informed the appellant by letter, dated 31st May, 1967, that the appellant will have to lift zinc dross and zinc ash along with Calcutta Industrial Corporation in equal proportion. Though by letter, dated 5th June, 1967, the appellant according to the respondent asked the respondent to take further action in the matter, yet subsequently, by letter, dated 21st June, 1967, the appellant went back on the contract and informed the respondent that it will be difficult for it to share the contract, with another party and that it can accept the contract for zinc dross only. On 21st June, 1967, the respondent informed the appellant that if the appellant should go back on the contract, its earnest money deposit will be forfeited as per the conditions of the tender terms and also a further claim for damages will be made against them. Alleging that the appellant has committed breach of contract the respondent claimed that the appellant is not entitled to a refund of the earnest deposit as it is liable to be forfeited according to clause (9) of the tender terms. On these grounds the respondent prayed for the dismissal of the suit.

3. In the first additional written statement, dated 15th December, 1970, the respondent stated that consequent to the breach of contract by the appellant it had to call for fresh tenders for the lifting of zinc dross and zinc ash and accept the offers of M|s. Agarwal Metal Company for zinc dross at the rate of Rs. 3,366.66 per metric tonne and M|s. Gayudin Algu Metal Refinery for zinc ash at the rate of Rs. 406-25 per metric tonne. Having regard to the total accumulation of zinc dross and zinc ash for the year 1967-68 at 58.70 tonnes and 71.02 tonnes respectively, the quantity that should have been lifted by the appellant, according to the respondent was one-half of the said quantity, namely, 29.35 tonnes and 35.51 tonnes respectively and consequent to the failure of the appellant to so lift the said quantity the respondent claimed it had suffered a loss of Rs. 39,291-55, owing to the breach of contract by the appellant. In paragraph 4 of that additional written statement, the respondent reiterated its right to forfeit the deposit of Rs. 5,000 made by the appellant as earnest money, as the said amount was a reasonable estimate of damages suffered by the respondent. Therein the respondent also reserved its right to file a suit against the appellant for the balance of the amount of loss suffered by it on account of the breach of contract by the appellant.

4. In yet another additional written statement dated 30th November, 1972, the respondent herein merely repeated paragraphs 1 to 3 of the earlier first additional written statement dated 15th December, 1970. In paragraph 4 of this additional written statement, the respondent claimed to have suffered a loss of Rs. 39,291-55 and stated that it was entitled to equitably set-off damages suffered by it to the extent of Rs. 5,000 as against the amount paid by the appellant as earnest money. In addition it was also stated therein that the respondent had already filed a suit in O.S. No. 7679 of 1971, for the recovery of the balance of the damages suffered by it. Ultimately the respondent pleaded that it may be allowed to set-off against the amount claimed by the appellant a sum of Rs. 5,000 being the part of the damages and prayed for the dismissal of the suit. It may also be mentioned that the respondent had paid court-fee on the plea of set-off raised by it.

5. O.S. No. 7679 of 1971, was filed by the respondent herein on 10th June, 1971, for the recovery of a sum of Rs. 34,291-58 from the appellant with interest thereon at 12 per cent. per annum from the date of suit till realization and for other incidental reliefs. The respondent, after referring to the issue of the tender notice for the purchase and removal of zinc dross and zinc ash from the Galvanising Plant at Mettur Dam on the terms and conditions mentioned therein, stated that the appellant accepted to purchase and remove zinc dross and zinc ash at the rate of Rs. 1,225 and Rs. 2,175 respectively, exclusive of sales-tax and packing charges per 1,000 kilograms ex-works, subject to the conditions set out in the instructions to the tenderers after accepting the counter offer of the respondent as per its letter, dated 11th May, 1967. The respondent further stated that by letter, dated 31st May, 1967, the appellant was informed that zinc dross and zinc ash can be removed by it along with

another party in equal proportions. By letter, dated 21st June, 1967, the respondent charged the appellant for having gone back on the concluded contract and by another letter, dated 28th June, 1967, the respondent informed the appellant that because the appellant went back on the contract, the earnest money was forfeited. Inasmuch as the appellant had informed its unwillingness to pay for and remove the zinc dross and zinc ash during the period in question in accordance with the terms agreed to, the respondent claimed that it had to call for fresh tenders and sell the zinc dross and zinc ash to M|s. Agarwal Metals Company and M|s. Gayudin Algu Metal Refinery at the rate of Rs. 2,366-66 per metric tonne and Rs. 406-25 per metric tonne respectively calculating on the basis of the total accumulation of zinc dross and zinc ash at the Galvanising Plant at Mettur Dam during the year 1967-68, the quantity that should have been lifted by the appellant was arrived at 29.35 metric tonnes and 35.5 metric tonnes respectively and as a result of the breach of contract by the appellant, the respondent claimed that it had suffered a loss of Rs. 39,291-58 as the respondent had to sell the zinc dross and zinc ash at prices lower than that contracted by the appellant. The respondent claimed that the loss on the sale of 29.35 metric tonnes of zinc dross at Rs. 348-44 per metric tonne was Rs. 10,226.71 and the loss by the sale of zinc ash of 35.51 metric tonnes at Rs. 818-78 per metric tonne worked out to Rs. 29,064-87 totalling to Rs. 39,291-58. Deducting from this a sum of Rs. 5,000 paid by the appellant as earnest deposit the loss sustained by the respondent was fixed at Rs. 34,291-58 which was claimed by the respondent against the appellant.

6. The appellant in its written statement contended that there was no concluded contract between the parties as there was no *cansensus-ad-idem* and the offer and acceptance were not on identical terms. The appellant also claimed that though there were offers and counter offers there was no unconditional acceptance between the parties. The appellant charged the respondent with breach even assuming that there existed a concluded contract between the parties. The splitting up of the offer after its acceptance was also objected to by the appellant. The claim of the respondent to forfeit the deposit of Rs. 5,000 made by the appellant was also disputed. The quantity, quality and the cost of materials adverted to in paragraph 5 of the plaint were all disputed. The suit itself was characterised as a counter-blast to the suit in O.S. No. 3216 of 1968, filed by the appellant against the respondent. The alleged sustaining of damages by the respondent was questioned by the appellant. The appellant, besides craving leave to refer to the plaint in O.S. No. 3216 of 1968 as part of the written statement, raised an objection as regards the jurisdiction of the Court to entertain the suit, as the appellant carried on business at Bangalore and there was no contract at Madras and in any event, since the acceptance was only at Bangalore, no suit would lie within the jurisdiction of the Courts at Madras. The appellant also disputed the binding nature of the conditions of the tender as they had not been signed by a partner. A plea that the suit is barred by limitation was also raised by the appellant.

7. On these rival contentions, the following issues were framed for trial:—

(1) Whether the defendant committed breach of contract?

(2) Was there contract concluded and if, so, what are relevant terms?

(3) Whether the Court has no jurisdiction?

(4) To what relief? and

(5) Whether the suit is barred by limitation?

8. Since the suits arose between the same parties and out of the same transaction, the Principal Judge, City Civil Court, Madras by his order, dated 29th March, 1973 in C.M.P. No. 281 of 1973 directed that these suits should be tried and disposed of together and by consent evidence in both these suits had been recorded in O.S. No. 3216 of 1968. The suit, *viz.*, O.S. No. 3216 of 1968 was earlier decreed on 26th October, 1968, and on appeal therefrom in A.S. No. 424 of 1969, the decree was set aside and the suit was remanded for further trial. A.A.O. No. 462 of 1971, was preferred against the remand order passed in A.S. No. 424 of 1969 and Venkataraman, J., confirmed the remand order on 27th October, 1972, and the Judgment is reported in *Maheswari Metals and*

Metal Refinery Bangalore-2 v. *The Madras State Small Industries Corporation Limited, Madras-2*[1]. A reference to the conclusions arrived at therein will be made later in the course of this judgment. Meanwhile, the respondent instituted the other suit in O.S. No. 7679 of 1971 on 10th June, 1971, against the appellant. Pursuant to the directions of this Court in A.A.O. No. 462 of 1971, the respondent had filed an additional written statement in O.S. No. 3216 of 1968 pleading an equitable set-off in respect of Rs. 5,000 and paying court-fee also thereon, as referred to earlier. In O. S. No. 3216 of 1968, originally, the evidence consisted of Exhibits B-1 to B-14 with no oral evidence. But at the joint trial after remand of O.S. No. 3216 of 1968, Exhibits A-1 and B-15 to B-19 were marked and D.W. 1 was examined. On a consideration of the oral as well as the documentary evidence the learned V Assistant Judge, City Civil Court, Madras held that in view of the findings given in A.A.O. No. 462 of 1971, it is not open to the parties to agitate the point as to who committed the breach as it had been already held that the appellant committed breach and that the respondent would, therefore, be entitled to recover damages sustained by it by reason of the default of the appellant. It was also further held that it is open to the respondent to adjust the sum of Rs. 5,000 towards damages and that this procedure is one which would fall under the rule of equitable set-off and permitting such a set-off would also be well within time on the date of the suit instituted by the appellant. The loss sustained by the respondent on account of the breach of contract was fixed at Rs. 34,291-58. Dealing with the objection of the appellant that no notice was given to the appellant regarding the re-sale of the goods and therefore it cannot be held liable for damages, the trial Court held that this is a case in which the goods had been disposed of by calling for tenders again after the breach and therefore, it cannot be contended by the appellant that it could not be made liable for damages for want of notice. The objection raised by the appellant that the claim in O.S. No. 7679 of 1971 is barred by Order 2, rule 2 (3), Civil Procedure Code, was negatived. A finding was also given that the cause of action for recovery of damages arose only on 1st May, 1968, and since the Court was closed on 1st May, 1971, the suit which was filed on the re-opening day would not be barred by limitation under Article 55 of the Limitation Act, 1953. The Court at Madras was held to have jurisdiction, as part of the cause of action had arisen at Madras, where the office of the respondent is situate. Consequent to these findings O.S. No. 3216 of 1968 was dismissed and in O.S. No. 7679 of 1971 a decree was granted in favour of the respondent against the appellant in a sum of Rs. 34,291-58 with costs. Against the dismissal of the suit in O.S. No. 3216 of 1968, A.S. No. 436 of 1976 has been preferred, while against the decree in O.S. No. 7679 of 1971, A.S. No. 24 of 1975 has been filed and like the suits, the appeals have also been heard together as the parties are common and the evidence also is the same.

9. Before proceeding to consider the arguments urged by the learned counsel on both sides, it is necessary to advert to the conclusions arrived at by this Court earlier, while disposing of A.A.O. No. 462 of 1971 on 27th October, 1972, as by such a course, the controversy between the parties gets considerably narrowed down. Venkataraman, J., on a consideration of the correspondence that passed between the parties held towards the end of paragraph 18 of the Judgment that when under Exhibit B-10, dated 27th|31st May, 1967, the defendant (respondent) expressed its acceptance of the rate of Rs. 2,715 and Rs. 1,225 and split up the tender between the plaintiff (appellant) and another party, though unnamed, there resulted a contract in law. Again in paragraph 21 of the Judgment the learned Judge further held that the conclusion that with the acceptance of the tender under Exhibit B-10, dated 27th|31st May, 1967, a contract resulted carries with it the consequence that the plaintiff (appellant) committed breach of the contract, because it was not prepared to share the business with another. This refusal of the appellant to share the contract with another person as suggested by the respondent is contained in Exhibit B-12, dated 21st June, 1967. The sum of Rs. 5,000 deposited by the appellant was held to be earnest money, but that it was

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1. (1973) 1 M.L.J. 209: 86 L.W. 785: A.I.R. 1974 Mad. 39.

not open to the respondent to automatically forfeit this amount without proof of damages. After referring to several decisions touching the question of equitable "set-off" this Court held that it cannot interfere with the discretion exercised by the learned appellate Judge in allowing the defendant (respondent) to raise the plea of equitable set-off to the extent of the plaintiff's (appellant's) claim but subject to three matters. The first was that the defendant (respondent) must pay court-fee on the equitable set-off. The second was that the defendant (respondent) must be put on terms. After pointing out that in the additional written statement filed in December, 1970, the defendant (respondent) has stated that the total damages suffered by it was Rs. 39,291.55 and that it is entitled to forfeit the deposit of Rs. 5,000 and it is ready to file a suit against the plaintiff (appellant) for the balance of the amount of loss suffered by it on account of the plaintiff's (appellant's) breach the subsequent filing of O.S. No. 7679 of 1971 on 10th June, 1971 was taken into account and after extracting one paragraph from a written statement to be filed to the effect that the defendant (respondent) may be permitted to set-off against the plaintiff (appellant) the sum of Rs. 5,000 being the part of damages suffered by them, this Court pointed out that though a contention was raised that the subsequent suit would be barred by the principle of Order 2, rule 2 (3), Civil Procedure Code, yet that question was not decided. But, this Court recorded that neither before the appellate Judge nor before this Court any leave has been asked on behalf of the defendant (respondent) for filing such a suit and neither the Judgment of the appellate Judge nor this Court should be construed in any way as giving or granting any such leave. The Additional written statement already filed in the City Civil Court in December, 1970 was directed to be eschewed as it did not plead any equitable set-off and proceeded on the basis of a right to forfeit the deposit of Rs. 5,000. Thirdly, a draft additional written statement filed before this Court was directed to be filed before the City Civil Court, on condition that the defendant (respondent) pays a sum of Rs. 300 to the plaintiff (appellant) or his counsel within three weeks from that day and subject to the further condition that the defendant (respondent) pays the requisite court-fee on the claim of Rs. 5,000. Subject to these the order of remand was confirmed and the appeal was dismissed. In view of the findings arrived at by this Court referred to above it follows that there was a concluded contract on the acceptance of the tender under Exhibit B-10, dated 27th|31st May, 1967 and that the appellant committed breach and the respondent will be entitled to recover damages which it sustained by reason of the fault of the appellant and part of which was allowed to be pleaded as a set-off by the respondent by an additional written statement. In view of these conclusions, it is no longer open to the parties to these appeals to agitate these questions over again.

10. The first submission of the learned counsel for the appellant Mr. Vedantam Srinivasan is that even on the footing that the contract was concluded and the appellant was the defaulting party as found by this Court, the breach thereof occurred on 21st June, 1967 and the suit O.S. No. 7679 of 1971 having been filed on 10th June, 1971, more than three years from 21st June, 1967, is barred under Article 55 of the Indian Limitation Act, 1963. On the other hand, the learned counsel for the respondent contends that the quantum of damages incurred by the respondent as a result of the breach of the contract by the appellant in the instant case could not be ascertained till the re-sale of the goods as per the offers under Exhibits B-15 and B-16 by the respondent in favour of third parties after calling for tenders and as such an event did not happen till 1st May, 1968, limitation would start only from that date and since the Court was closed in May, 1971, the institution of the suit on 10th June, 1971 in the reopening Court would be well within time.

11. The date of breach has therefore, to be first ascertained from the pleadings and the relevant documents which is bound to be the same both for the appellant and the respondent though that breach may give rise to a cause of action to the parties to pursue such remedies as are open to them within the time allowed. In the plaint in O.S. No. 7679 of 1971 filed by the respondent in paragraph 4 pointed reference is made by the respondent to the appellant having gone back on the con-

cluded contract by its letter, dated 21st June, 1967 and it is also admitted that the respondent informed the appellant by letter, dated 28th June, 1967, that the appellant had gone back on the concluded contract and therefore, the earnest money was forfeited. Paragraph 5 of the plaint sets out the steps stated to have been taken by the respondent for the sale of zinc dross and zinc ash by calling for fresh tenders and paragraph 6 gives details of the loss stated to have been incurred by the respondent as a result of the breach of contract by the appellant. In paragraph 8 of the plaint which sets out the cause of action for the institution of the suit, mention is made by the respondent of the acceptance of the counter offer made by the respondent by the appellant on 11th May, 1967, the going back by the appellant on the contract on 21st June, 1967 and the removal of the zinc dross and zinc ash on 1st May, 1968 as having furnished the cause of action for the institution of the suit. In the written statement filed by the appellant the existence of the contract and its breach by the appellant are denied. The particulars of the cause of action are also disputed in paragraph 11 in addition to questioning the jurisdiction of the Court to entertain the suit. In paragraph 13 of the written statement, the plea that the suit is barred by limitation has also been taken. The invitation for tenders for the purchase of zinc dross and zinc ash has been made under Exhibit B-1, dated 6th April, 1967.

12. In so far as the present controversy is concerned, clauses 4, 7 and 9 would be relevant. Clause 4 states:—

"The Managing Director of 'Madras State Small Industries Corporation reserves the right of rejecting all or any part of the tenders without giving any reason for the same and split up the tender as he may deem fit."

Clause 7 says:—

"Each tender must be accompanied by a deposit of Rs. 5,000 earnest money in the form of cash or demand draft in favour of Senior Accounts Officer (cash) of this Corporation."

Clause 9 provides as follows:—

"If the tenderer fails to adhere to the terms and conditions prescribed in the tender or backs out when his tender is accepted, his deposit mentioned above will be forfeited to the Corporation in full. If the tenderer fails to take delivery of the materials within the time-limit prescribed the earnest money deposit will be forfeited to the Corporation in full as a penalty. Besides, the materials will then be disposed of otherwise, and loss, if any, in total value between the accepted tender rates and the value realized on such disposal will be made good from the defaulting tenderers."

By Exhibit B-2, dated 24th April, 1967, the appellant made a tender of Rs. 2,705 per metric tonne of zinc dross and Rs. 360 per metric tonne of zinc ash. On 9th May, 1967, the respondent under Exhibit B-3 sent a letter enquiring whether the appellant is prepared to lift both Zinc dross at Rs. 2,715 per metric tonne and zinc ash at Rs. 1,225 per metric tonne, subject to other tender conditions. To this the appellant sent a reply under Exhibit B-5, dated 10th May, 1967 requesting time till 17th May, 1967 for confirmation. But, on 11th May, 1967 the appellant sent a telegram followed by the letter Exhibit B-6 signifying its willingness to accept the rates for zinc dross, zinc ash at Rs. 2,715 and Rs. 1,225 per metric tonne respectively. Exhibit B-7, dated 13th May, 1967 and Exhibit B-9, dated 26th May, 1937 were merely reminders sent by the respondent reiterating the same and asking for confirmation from the appellant. Thereafter under Exhibit B-10, dated 27|31st May, 1967, the respondent while accepting the rates offered by the appellant for zinc dross at Rs. 2,715 per metric tonne and zinc ash at Rs. 1,225 per metric tonne, stated that that acceptance was subject to all the conditions laid down in the instructions to the tenderer. In addition it was also stated that the zinc dross and zinc ash actually accumulated during the period of contract will have to be removed by the appellant at the above rates, alternatively with another party more or less in equal consignments. To this, the appellant sent a reply under Exhibit B-11, dated 5th June, 1967 acknowledging the receipt of the letter dated 31st May, 1967 and awaiting further action. But the appellant wrote on 21st June, 1967, Exhibit B-12 to the respondent as follows, after referring to Exhibit B-10:

"In our original tender submitted to you we quoted the highest rate of Rs. 2,705 per metric tonne for zinc dross. We were under the impression that we would be given the contract for zinc dross at our highest rate.

But subsequently you have given us a counter-offer for both zinc dross at Rs. 2,715 and zinc ash at Rs. 1,225 per metric tonne and asked us to offer our willingness to accept the above counter-offer. We have accepted your counter-offer for both zinc dross and ash at the above rates under the impression that you would award the full contract to us.

From your confirmation letter quoted above, we came to know that the contract has been split up to two parties and that we will have to share the quantity of zinc dross and ash equally with the other party.

We would therefore, like to mention that practically it is difficult to share with the other party and that we are not prepared to accept this split up contract unless the contract is completely awarded to us.

(Italics ours).

We therefore request you to go through our above points and request you to be kind enough to award us with the full contract to enable us to lift the entire quantity of zinc dross and ash that will accumulate during this year, without sharing with the other party. Even we are prepared to accept the contract for full quantity of zinc dross alone at the rate of Rs. 2,715 per metric tonne as we are the highest tenderer for zinc dross quoted in our quotation."

To this, the respondent appears to have sent a letter, dated 28th June, 1967 received by the appellant on 30th June, 1967 stating that the contract was finalised by the letter, Exhibit B-10, dated 27th|31st May, 1967 and it was neither possible to award the contract completely to the appellant nor to entrust the contract for the zinc dross alone. It also appears that the respondent further pointed out that the deposit amount of Rs. 5,000 was liable to be forfeited and asked the appellant to show cause why the amount should not be forfeited. Exhibit B-13, is the reply sent by the appellant stating that the respondent has no right to forfeit the deposit. Exhibit B-14 is the further reply that has been sent by the respondent to the appellant pointing out that the respondent has no other alternative but to forfeit the deposit of Rs. 5,000 in accordance with clause 9 of the instructions to the tenderers. Exhibit B-14 finally winds up by stating that if the appellant fails to write to the respondent within a week of receipt of that letter, the deposit of Rs. 5,000 will be forfeited and steps will all be taken to dispose of the materials.

13. The correspondence referred to above would clearly and unmistakably point out that though even initially there was a term that the offer may be split up, (*sic*) the condition that the appellant should share the lifting of zinc dross and ash with a third party was introduced by Exhibit B-10, dated 27th|31st May, 1967 and this was in accordance with clause 4 of the tender conditions which reserved the right to the Managing Director of the respondent to split up the tender as he may deem fit. Consequently, the appellants were not in order when they objected to the splitting up of the contract by letter, Exhibit B-12, dated 21st June, 1967. This letter did not merely stop with a protest by the appellant for having split up the contract between two parties, but it clearly proceeded to express the inability of the appellant to accept and perform the split up contract and paragraph 4 of Exhibit B-12 extracted above clearly mentions this. In our view, this constitutes a repudiation by the appellant of the concluded contract under Exhibit B-10 and a definite expression of its inability to adhere to and perform its terms. *Prima facie* therefore, in the instant case the contract has been broken by the appellant by its letter Exhibit B-12, dated 21st June, 1967. The further correspondence exchanged between the parties and referred to above also discloses that in so far as the appellant is concerned it had treated the contract as having come to an end and the respondent also was only anxious to give effect to the other conditions of the tender arising on breach or non-fulfilment of the terms of the contract. This is established by Exhibit B-13 where there is a reference to the receipt of a letter, dated 28th June, 1967 from the respondent by the appellant on 30th June, 1967 stating that the alternative proposals set out by the appellant

were not acceptable to the respondent, but that the respondent will be entitled to forfeit the sum of Rs. 5,000. The question of forfeiting any deposit amount would arise only in the event of default in the performance of the terms and conditions or there being a breach of the contract. Clause 9 of the tender conditions also states that if the tenderer fails to take delivery of the materials within the time-limit prescribed or if he fails to adhere to the terms and conditions prescribed in the tender, or if he backs out when his tender is accepted then the deposit will be forfeited to the Corporation in full. The circumstance that the respondent had addressed a letter on 28th June, 1967 indicating that the amount of Rs. 5,000 will be forfeited shows that even the respondent had treated that the appellant had backed out of the contract and had also failed to adhere to its terms and conditions and therefore the respondent will be in order in giving effect to clause 9 of the tender conditions and forfeiting the deposit made by the appellant. It is, therefore, clear that the respondent also understood Exhibit B-12 dated 21st June, 1967, as a clear repudiation by the appellant of its obligations under the concluded contract under Exhibit B-10, dated 27|31st May, 1967; as otherwise, there was really no occasion for the respondent to have entertained the idea of forfeiture of the amount deposited by the appellant. In addition, in the course of the Judgment in *Maheswari Metals and Metal Refinery, Bangalore-2* v. *The Madras State Small Industries Corporation Limited, Madras-2*[1], Venkataraman, J., has stated thus at page 214:

> "The conclusion that with the acceptance of the tender under Exhibit B-10, dated 27|31st May, 1967, a contract resulted carries with it the consequence that the *plaintiff committed breach of contract because it was not prepared to share the business with another*". (Italics ours.)

Obviously, the reference is to Exhibit B-12, dated 21st June, 1967, and the learned Judge felt inclined to hold that the breach was committed by the appellant by its communication expressing its inability to share the business with another person. From the above it follows that the breach of contract by the appellant had taken place on 21st June, 1967, when the appellant clearly communicated under Exhibit B-12 its inability to share the contract with another and also its unpreparedness to accept the split up of the contract.

14. The next question that has to be considered is whether notwithstanding the refusal of the appellant under Exhibit B-12 such refusal would amount to repudiation giving a right to the respondent to put an end to the contract under section 39 of the Indian Contract Act, or whether the respondent wanted to keep alive the contract for the benefit of both parties. The scope of section 39 of the Indian Contract Act, came to be considered by a Division Bench in *V. K. Kumaraswamy Chettiar* v. *P. A. S. V. Karuppuswamy Moopanar*[1]. Dealing with the scope of section 39 of the Indian Contract Act, Venkatarama Aiyar, J., observed at page 791 thus:

> "Where a contract is to be performed at a future date and before the time for performance arrives one of the parties gives notice to the other party that he is not willing to perform his part of the agreement then there is what has been called an "anticipatory breach" of the contract by him. This expression was characterised by Lord Wrenbury as unfortunate in *Bradely* v. *Newsom*[2], because strictly speaking, there can be no breach *in praesenti* of an obligation which is to be performed in future. The substance of the matter however, is that when a party refuses to perform his part of the agreement before the due date, he in effect throws up the contract; and then the question is what the other party might then do. He might either accept the repudiation and treat the contract as broken then and there and proceed to claim damages or he might notwithstanding the repudiation by the other party get ready for performing his part of the contract in due course, offer performance when the time for

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1. (1973) 1 M.L.J. 209: 86 L.W. 785: A.I.R. 1974 Mad. 39.

1. (1952) 2 M. L. J. 785: 65 L. W. 1074: I.L.R. (1953) Mad. 488: A.I.R. 1953 Mad. 380.
2. (1919) A.C. 16.

it arrives and on the refusal by the other party claim damages for breach of the contract by him. In that case he keeps the contract alive for the benefit of both the parties".

15. As seen earlier, the appellant had refused to perform any part of the agreement and had in effect thrown up the contract. Thereafter, it was certainly open to the respondent, to have elected one of two courses, namely, either to have accepted the repudiation and treat the contract as broken then and there or to offer performance when the time for it arrives and on the refusal by the appellant to claim damages from him. In the present case it has already been seen that on receipt of the letter of repudiation, Exhibit B-12, sent by the appellant to the respondent, the respondent had understood it on 28th June, 1967, as a breach and there was not even the slightest indication that the respondent thereafter wanted to keep the contract alive for the benefit of both parties. Indeed there has been a manifestation of a contrary intention by the respondent when it referred to the immeiate forfeiture of the amount that was deposited by the appellant in a sum of Rs. 5,000. This is certainly not consistent with the idea of keeping alive the contract for the benefit of both parties. Besides, in spite of the repudiation by the appellant it has not been established that the respondent offered performance as and when the time for performance arrived and that there was a refusal on the part of the appellant. This again would indicate that on receipt of the letter of repudiation under Exhibit B-12, dated 21st June, 1967, the respondent had also decided to treat the contract as broken then and there. Even in this view, the breach of contract must be held to have taken place on 21st June, 1967. It is needless to point out that when once a contract has been broken, it is dead and there is nothing that can keep it alive thereafter. Under these circumstances, the contract in question entered into between the parties had been broken by the appellant on 21st June, 1967 and breach had been accepted by the respondent and thereafter there was no attempt whatever on the part of the respondent to keep the contract alive for the benefit of both parties. We, are therefore, of the view that in so far as the claim for damages against the appellant is concerned the cause of action arose on the date of breach namely 21st June, 1967.

16. That Article 55 of the Indian Limitation Act of 1963, will be applicable to the present case is not in dispute. That provides that a suit for compensation for breach of any contract, express or implied has to be instituted within three years from the date of breach or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases. It is not anybody's case that the instant case is one where there are successive breaches or the breach is a continuing one. It has already been held that the contract in the present case was broken on 21st June, 1967, by the appellant and consequently, the respondent would have had three years time from that date to institute a suit and to recover damages. That would mean that any such suit instituted by the respondent claiming damages after 21st June, 1970, would be barred. It is in this connection the learned counsel for the respondent strenuously contends that the loss incurred became known by the sale of the zinc dross and zinc ash to third parties on 1st May, 1968, and therefore, till the loss so incurred is known or ascertained there is really no cause of action for the institution of a suit against the appellant.

17. In the plaint in O.S. No. 7679 of 1971, the respondent has not set out the basis on which it claims that on 1st May, 1968, the cause of action, arose though it is stated that on that day the accumulated zinc dross and zinc ash were removed by fresh contractors. The question therefore, is whether even after a breach of contract to the knowledge of both parties, the circumstance that one party takes considerable time to call for tenders and sell the goods to third parties would extend in any manner, the period of limitation for the institution of a suit for recovery of damages or suspend the cause of action which had already arisen during such interval. It is at once obvious that if this argument on behalf of the respondent is accepted, it will be certainly open to a person in the position of the respondent to remain quiet for quite a long

number of years and then purport to call for tenders and sell the goods and thereafter claim that the cause of action for the recovery of damages arose only on the date of sale. It is even conceivable that such a period might well be beyond three years and therefore, to accept such a contention would be to render the period of three years from the date of breach occurring in the third column of Article 55 of the Limitation Act a dead-letter. This argument now pressed by the learned counsel for the respondent was not accepted by the Division Bench in *Soundararajan and Co., Ltd.* v. *K. P. A. T. Annamalai Nadar*[1]. In repelling this contention Anantanarayanan, J. (as he then was), observed thus:

"It (the claim) ought to have been instituted within three years of the date of the breach of the contract and it is no defence to this objection to urge that it was only the occasion of re-sale which enabled the defendant firm to ascertain exactly the degree of damages or the precise amount which would represent the injury suffered by them. The occasion for ascertainment will have to be distinguished from the date upon which the cause of action arose, and from which limitation began to run".

18. Reliance was also placed in this connection by learned counsel for the respondent on sections 22 and 23 of the Limitation Act. We fail to see how those sections can have any application to the present case. There is no question of any continuing breach as contemplated in section 22 on the terms of the contract in the instant case, when the breach has taken place, on 21st June, 1967 and the cause of action also accrued on that date. Section 23 contemplates suits for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom. In the present case the breach of contract by itself, affords a cause of action for the suit and the respondent need not wait for some other specific injury resulting therefrom. Therefore, sections 22 and 23 of the Limitation Act, can have no application to the present case. In *Rajagopal Naidu* v. *Aiyyaswamy Chettiar*[2], Ramamurthi, J., after referring to the observations of Ananatnarayanan, J. (as he then was), in *Soundarajan and Co.* v. *Annamalai Nadar*[1], referred to already, observed this:—

"The acceptance of the contention urged by learned counsel for the appellant would be completely opposed to the scheme of Article 115 and sections 23 and 24 of the Limitation Act. In every case of a breach of contract for the sale of goods, the plaintiff who comes to Court, has a duty to mitigate the damages and he may have to take certain steps with regard to the goods in question and it is only after such steps are taken by way of re-sale that the damages could be ascertained. That does not mean that the running of time is postponed till the damages are actually ascertained and after re-sale".

We may add that when once the cause of action for a suit had arisen on breach of contract, the running of time cannot be arrested nor can such a cause of action be kept in a state of suspension as it were till such time as the damages are ascertained after a leisurely re-sale at the convenience of one of the parties. We are, therefore, unable to accept the contention of the learned counsel for the respondent that the cause of action for instituting O.S. No. 7679 of 1971 arose only on 1st May, 1968, when the goods were re-sold after inviting fresh tenders and removed and when the damages were actually ascertained. The suit should have been brought within three years from 21st June, 1967, the date of breach and having been brought on 10th June, 1971, the claim of the respondent for damages against the appellant is barred by limitation.

19. The next contention of the learned counsel for the appellant is that the suit O. S. No. 7679 of 1971 is barred by the principle of Order 2, rule 2 (3), Civil Procedure Code. The learned counsel submits that having regard to the breach which was committed in June, 1967, it was the duty of the respondent when the appellant sought the recovery of the sum of Rs. 5,000 paid by it as a deposit to have pleaded that it was not

1. A.I.R. 1960 Mad. 480.
2. (1965) 2 M. L. J. 135: 78 L. W. 658: A.I.R. 1965 Mad. 532.

1. A.I.R. 1960 Mad. 480.

only not liable to the appellant for the claim made in O.S. No. 3216 of 1968 but that it had also incurred damages as claimed in O. S. No. 7679 of 1971 and in the absence of such a claim for damages or leave from Court enabling the respondent to institute a separate suit for the recovery of such damages the suit as instituted by the respondent does not lie. The learned counsel for the respondent on the other hand points out that in the written statement filed by the appellant in O. S. No. 7679 of 1971, no such plea had been raised in this regard and consequently, the appellant should not be permitted to raise such a plea. A perusal of the written statement filed by the appellant in O.S. No. 7679 of 1971, no doubt discloses that this objection was not specifically and pointedly raised. But even so, no prejudice has been caused to the respondent because it is found that even before this Court and the trial Court this legal plea had been raised by the appellant, though that was decided against the appellant and consequently it cannot be said that the point was not raised earlier by the appellant. The objection in this regard raised by the learned counsel for the appellant has to be considered in its twin aspects, *viz.*, whether on the facts and circumstances of the present case any duty, at all was laid on the respondent to set up its entire claim for damages as against the appellant in the course of the written statement filed by it in O.S. No. 3286 of 1968 and what is the effect of a failure in this regard. In the present case, it had already been seen that in O.S. No. 3216 of 1968, three written statements were filed by the respondent. The first is dated 17th September, 1968 and therein nothing has been stated about the set-off in relation to the claim of Rs. 5,000 made by the appellant or about the damages stated to have been sustained by the respondent as a result of the breach of contract committed by the appellant. In the second written statement, dated 15th December, 1970 in paragraphs 3 and 4 the respondent had attempted to state that it had suffered a loss of Rs. 39,291.55 and that therefore it is entitled to forfeit the deposit of Rs. 5,000 made by the appellant. Besides, it has also been stated, that the respondent reserves its right to file a suit against the appellant for the recovery of the balance of the amount of loss suffered by the respondent owing to the breach committed by the appellant. Unfortunately for the respondent, in the earlier order of the High Court in A.A.O. No. 462 of 1971, there is a definite direction that this additional written statement must be eschewed because it does not plead an equitable set-off, but it proceeds on the basis of a right in the respondent to forfeit the deposit of Rs. 5,000. In the third written statement dated 30th November, 1972 filed pursuant to the directions of the High Court in A.A.O. No. 462 of 1971, in paragraph 3 after setting out the details of the loss suffered by the respondent, the respondent in paragraph 4 claims that it is entitled to equitably set-off damages suffered by it to the extent of Rs. 5,000 against the amount paid by the appellant as a deposit. In addition, it is also stated that the respondent had already filed a suit in O.S. No. 7679 of 1971 for the recovery of the balance of the damages suffered by it.

20. It is seen that O.S. No. 7679 of 1971 had been instituted on 10th June, 1971, that is, even long before the additional written statement was filed. It is also significant to note that a court-fee of Rs. 350 had been paid by the respondent on the relief of equitable set-off in a sum of Rs. 5,000 claimed by it. Under Order 8, rule 6 (1), Civil Procedure Code, where a set-off is claimed by the defendant in a suit in an ascertained sum of money legally recoverable by the defendant from the plaintiff, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the set-off sought. The effect of such a claim of set-off is stated in Order 8, rule 6 (2), Civil Procedure Code. Such a claim shall have effect according to that rule, as a plaint in a cross-suit, so as to enable the Court to pronounce a final judgment in respect of both the original claim and the set-off. In the present case the equitable set-off to the tune of Rs. 5,000 was permitted to be raised by this Court, in the additional written statement and therefore, the set-off claimed should be held to be unexceptionable and in order. In the same written statement, the institution of another suit in O.S. No. 7679 of 1971 for the recovery of the balance by the respondent is also stated. The effect of a conjoint reading of the first and the third written statements permitted to be filed by this Court eschewing

the second is that in relation to the total claim of damages by the respondent against the appellant in a sum of Rs. 39,251.88 a sum of Rs. 5,000 is pleaded as a set-off to the claim of the appellant against the respondent in O. S. No. 3216 of 1968, while for the recovery of the balance of Rs. 34,251.88, O.S. No. 7679 of 1971 had been instituted. In other words the entire damages recoverable from the appellant, according to the respondent has been set forth and claimed excepting that a part of it was pleaded as a set-off to the claim of the appellant and the rest formed the subject-matter of the suit O.S. No. 7679 of 1971.

21. The learned counsel for the respondent, pointed out that a claim for damages which may properly form the subject-matter of a set-off even in the larger sense of a combination of defence and counter-claim could as well be agitated by the independent suit and consequently, it is not necessary that the respondent should always raise such a claim by way of defence only. For this purpose, the learned counsel for the respondent invited our attention to *Meenakshinada Dikshatar* v. *Murugesa Nadar*[1]. At page 479, Ramaprasada Rao, J. (as he then was), while dealing with the question as to what is required to be done by a defendant who opposes a claim for refund of deposit pointed out that the defendant had to plead and prove the damages suffered upon which the Court will adjudicate as to what may be the reasonable compensation to which the defendant is entitled and deduct the same and award a decree in favour of the plaintiff only for the balance. The procedure which a defendant had to follow in such circumstances has also been indicated by the learned Judge as a plea of set-off or a counter-claim against the plaintiff for damages for breach of contract. The learned Judge further observed that no doubt an independent suit for the same purpose is also maintainable.

22. In *P. Venugopala Pillai* v. *Thirugnanavalli Ammal*[2], the question which arose was whether the failure of a plaintiff who had instituted a suit for recovery of kist paid by him to claim a set-off in that amount in an earlier suit for damages against him, would preclude him from maintaining an independent suit. The Bench pointed out that it would be open to such a person to maintain an action for the recovery of the amount paid. At page 850, the Bench observed thus:

> "It may also be open to him to set-off the amount in a suit for damages and what could be set-off could always be claimed in an independent action and the fact that a set-off was not claimed against a demand in a prior action would not preclude the claim being agitated in an independent action."

From the above it is clear that it is certainly open to a person in the position of the respondent to agitate its claim for damages in a separately constituted and independent action as has been done in this case and not necessarily only by way of set-off. There is thus, no omission in our opinion, by the respondent to sue for all the reliefs without the leave of Court.

23. However, the learned counsel for the appellant invited our attention to the decision reported in *Nawbutt Pathak* v. *Mahesh Narayan Lal*[1]. In that case in a previous suit brought by *A* against *B*, the latter had claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts between the parties, and had omitted to claim a set-off in respect of the remainder. In a subsequent suit brought by *B* against *A* for the remainder, an objection was raised that the suit was not maintainable. The Calcutta High Court after referring to the relevant provisions held that a claim to set-off does stand in several respects, in the same position as a claim by the defendant against the plaintiff in a separate suit. The learned counsel for the appellants also placed strong reliance upon the decision in *Katkersa Rowther* v. *Abdul Rahim Sahib*[2]. In that case the question arose whether a defendant who pleads a set-off under Order 8, rule 6, Civil Procedure Code, is to be deemed to be a plaintiff within the meaning of Order 2, rule 2, Civil Proce-

1. (1969) 1 M.L.J. 474: A.I.R. 1970 Mad. 391.
2. (1941) 2 M. L. J. 866: 54 L. W. 286: A.I.R. 1941 Mad. 847.

1. (1905) I.L.R. 32 Cal. 654.
2. (1942) 2 M.L.J. 43: 55 L.W. 407: I.L.R. (1942) Mad. 836: A. I. R. 1942 Mad. 580.

dure Code, and consequently, has to suffer the consequences of an omission. The Division Bench, after referring to the provisions of the Civil Procedure Code observed at 45 thus:

"Order 8, rule 6 (1) states that where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand an ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as in the plaintiff's suit the defendant may present a written statement containing the particulars of the debts sought to be set-off. Sub-rule (2) says that this written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect of both the original claim and the set-off. Therefore, the defendant who pleads a set-off is in the position of a plaintiff. Moreover his written statement has to be stamped according to the value of the relief he claims.

Order 2, rule 2 (2) says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but he may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) says that when a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished. Sub-rule (3) states that when a person is entitled to more than one relief in respect of the same cause of action he may sue for all or any relief but if he omits any, except with the leave of the Court, he shall not be allowed to sue later for the relief omitted. This rule makes it quite clear that a cause of action cannot be split up although reliefs may be if the Court agrees. If the plaintiff omits part of the claim which he is entitled to make in respect of the cause of action he has for ever lost his right to the part of the claim omitted.

The question whether the defendant who pleads a set-off is bound by Order 2, rule 2 was discussed by a Bench of the Calcutta High Court in *Nawbull Pathak* v. *Mahesh Narayan Lal*[1], and it was held that he was. The position was discussed at length by Mookerjee, J., whose judgment Abdul Rahman, J., accepted as embodying a correct statement of the law. We agree. Order 8, rule 6 (2) requires the written statement put in by a defendant pleading a set-off to be such as to enable the Court to pronounce a final judgment both in respect of the plaintiff's claim and of the defendant's claim."

The above observations clearly indicate that the Bench had purported to follow the principles of the decision of the Calcutta High Court already referred to. Nor does the principle of the decision in *Ameenammal* v. *Meenakshi*[2], based on *res judicata* apply to the present case as there has been no omission to make a claim as such. We are of the opinion that these decisions do not in any manner assist the appellant as the present case is not one of partial claim by a set-off and a total omission to claim the remainder or balance. On the facts and circumstances of this case noticed earlier, it cannot be said that there has been any intentional relinquishment of a portion of the claim by the respondent or an omission on its behalf to sue in respect of the entire amount. Consequently, the bar under Order 2, rule 2 (2), Civil Procedure Code is not attracted in the present case.

24. The next contention of the learned counsel for the appellant is based on section 54 of the Indian Sale of Goods Act and he contends that the respondent is not entitled to recover damages as claimed by it. On the other hand, the learned counsel for the respondent contends that the appellant was fully aware of clause 9 of the tender conditions and having known about it, it was certainly not open to the appellant to complain that the respondent is not entitled to recover damages arising on resale. In the present case the contract which had been concluded merely enables the appellant to life zinc dross at Rs. 2,715 per metric tonne and zinc ash at Rs. 1,225 per metric tonne. Even in the letter of acceptance under Exhibit B-10, dated 27th|31st May, 1967, it is stated that the quantity

1. (1905) I.L.R. 32 Cal. 654.
2. (1920) 12 L.W. 173.

of zinc dross and ash may be fluctuating and the quantity of both zinc dross and zinc ash actually accumulated has to be removed with another party in more or less equal consignments. The statutory power of re-sale under section 54 (2) of the Indian Sale of Goods Act, would arise, if the property in the goods has passed to the buyer, subject to the lien of the unpaid seller. However, where the property in the goods has not passed to the buyer the seller has no right of re-sale under section 54 (2).

25. This position is clearly laid down by the Supreme Court in *P. S. N.S. Ambalavana Chettiar and Co. Ltd.* v. *Express Newspapers Ltd., Bombay*[1]. Therein the scope of section 18 of the Sale of Goods Act has also been dealt with and it is pointed out that section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods, (namely, 300 tonnes of newsprint out of 415 tonnes lying in the respondent's godown in that case) no property in the goods is transferred to the buyer unless and until the goods are ascertained and that it is a condition precedent to the passing of property under a contract of sale that the goods are ascertained. It was held that the condition had not been fulfilled in that case where there is a contract for sale of a portion of a specified larger stock and therefore, till the portion is identified and appropriated to the contract, no property passes to a buyer. Reference has also been made by the Supreme Court to the following passage in *Gillet* v. *Hill*[2]:

> "where there is a bargain for a certain quantity ex-greater quantity and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable before that is done. If I agree to deliver a certain quantity of oil as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided."

In this view, the Supreme Court held that no portion of 415 tonnes of the newsprint was appropriated under the contract by the respondent with the appellant's consent before the re-sale and consequently, the property in the goods had not passed to the buyer and therefore, the respondent has no right of resale under section 54 (2).

26. In the present case it is not known as to what quantity is likely to be available and how much out of that quantity, the appellant will be entitled to lift after appropriation by the respondent towards the fulfilment of the terms of the contract in its favour. Apart from the circumstances that even the larger stock has not been specified even the quantity out of such a larger stock remains unidentified and unappropriated. If the property had not passed section 54 (2) of the Sale of Goods Act can have no application as no power of re-sale is required to enable a person to sell his own goods. Such a power is required only when the property in the goods has passed to the buyer, subject to the lien of the unpaid seller and it is to this class of cases that section 54 (2) would apply. Sub-section (2) of section 54 of the Sale of Goods Act states that where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given the unpaid seller shall not be entitled to recover such damages and the buyer shall not be entitled to the profit, if any, on the re-sale. Indeed, in the present case it is doubtful whether the requisites for exercise of the right of re-sale as per the tender conditions were available at all. The law on this subject has been discussed in Pollack and Mulla on the Sale of Goods Act, Third Edition at page 215 thus:—

> "The question whether a seller of goods has the right of re-sale is important, for where he has such a right he is entitled to claim as damages the difference between the contract price and the amount realised on the re-sale less the costs of the re-sale, while if he has no such rights he is entitled to the difference between the contract price and

1. (1968) 2 S.C.J. 259: (1968) 2 M.L.J. (S.C.) 34: (1968) 2 An.W.R. (S.C.) 34: (1968) 2 S.C.R. 239: A. I. R. 1968 S.C. 741.
2. (1949) E.R. 871 at 873.

the market price on the date of the breach. The power to re-sell may be either statutory or it may be conferred on the seller by the terms of the contract of sale; in the former case it can be exercised only if the property in the goods has passed to the buyer, as is implied by the words of this section; in the latter case it can be exercised even if the property in the goods has not passed to the buyer. Thus if it is provided in a contract of 'indent' that on default on the part of the buyer to pay for and take delivery of the goods within a specified time, the seller should be at liberty to re-sell the goods and the buyer should pay all the loss arising on the contract with interest the seller is entitled to re-sell the goods on default on the part of the buyer even if the property in the goods has not passed to the buyer and to sue the buyer for the loss on re-sale but it is necessary to the exercise of this power that the goods contracted for should at least have been appropriated, for the purposes of the contract. If there has been no such appropriation, there is nothing to which the power of re-sale under the contract could attach and the seller is not entitled in such a case to the loss on re-sale, but to the difference between the contract price and the market price at the date of the breach."

It is clear from the above that in the circumstances of the present case the respondent is not entitled statutorily nor even contractually to claim the difference between the price fetched on re-sale and that contracted for but would be entitled, if at all, to claim as damages the difference between the contract price and the market price on the date of the breach as pointed out by the Supreme Court in *P. S. N. S. Ambalavana Chettiar and Co. Ltd.* v. *Express Newspapers Ltd., Bombay*[1].

27. The next submission of the learned counsel for the appellant is that there is no evidence of the market rate as on the date of the breach. It has already been found that the breach took place on 21st June, 1967. Exhibit B-15, dated 10th April, 1968 shows that the cost of zinc dross in April, 1968 was Rs. 2,366.66 per metric tonne. Exhibit B-16 is dated 3rd October, 1968 and is a tender quotation submitted by M|s. Gayuddin Algu Metal Refinery for the purchase of zinc dross and zinc ash at Rs. 2,181.25 and Rs. 406.25 per metric tonne respectively. Those rates have been mentioned in Exhibit B-16 to be firm till 13th October, 1968, only. Exhibit B-17 is the letter, dated 17th October, 1968 sent by the respondent to M|s. Gayuddin Algu Metal Refinery, and it says that the offer made by M|s. Gayuddin Algu Metal Refinery for the purchase of 100 metric tonnes of zinc ash at Rs. 406.25 per 1000 kilograms was accepted. Exhibit B-18, dated 25th October, 1968 is the reply sent by M|s. Gayuddin Algu Metal Refinery to the respondent agreeing to the terms and conditions set out in Exhibit B-18 and also enclosing a draft for Rs. 10,156. Exhibit B-19 is a report, dated 9th December, 1970 which furnishes the accumulation of zinc ash and dross and for 1967-68, the quantity of zinc dross has been mentioned at 58.7 and the quantity of zinc ash at 71.02 metric tonnes. The basis of the suit laid by the respondent is that the difference between the rate offered by the appellant and that evidenced by Exhibits B-15 and B-16 should be made available to it as and by way of damages. Unfortunately, Exhibits B-15 and B-16 relate to April, 1968 and October, 1968 long after the expiry of the period of the contract and have nothing whatever to do with the price of zinc dross or ash at or about the time of the breach. There is thus no evidence whatever that has been let in by the respondent to establish the quantum of damages sustained by it. Consequently, the quantum of damages as claimed by the respondent has not been established at all.

28. That however, does not mean that the respondent did not sustain any damages at all. Indeed, it was the argument of the learned counsel for the appellant that the damages sustained by the respondent cannot in any case exceed the sum of Rs. 5,000 and this, according to him, is on the basis of the Judgment of the Supreme Court in *Fateh Chand* v. *Balkishan Das*[1]. The Supreme Court in that case pointed out thus:

1. (1968) 2 S.C.J. 259: (1968) 2 S.C.R. 239; A.I.R. 1968 S.C. 741.

1. (1965) 2 S.C.J. 678: (1965) 2 An. W.R. (S.C.) 145: (1965) 2 M.L.J. (S.C.) 145: (1965) 2 S.C.R. 221: A. I. R. 1965 S.C. 1405 at 1412.

"Section 74, declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty.

But, the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.

The jurisdiction of the Court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

29. As pointed out already, in the present case, there is absolutely no evidence of the market rate as on the date of the breach and consequently, a precise assessment of the damages sustained by the respondent is not possible. In our view, the conduct of the appellants amounts to a failure on its part to adhere to the terms and conditions of the tender and backing out of it after acceptance for which the parties have themselves agreed or stipulated Rs. 5,000 by the first part of clause 9 of the tender conditions. In the absence, therefore, of any proof of the market rate as on the date of breach we are of the opinion that the amount of Rs. 5,000 with has been forfeited would be sufficient and reasonable compensation to the respondent.

30. The last objection that has been faintly raised by the learned counsel for the appellant is one of jurisdiction. According to him the appellant is a firm carrying on business at Bangalore and the respondent made the offer from Madras and the performance of the terms of the contract should be at Mettur and consequently, the Court at Madras will not have any jurisdiction. On the other hand, the learned counsel for the respondent contends that the receipt of the acceptance of contract by the appellant, in Madras would afford part of the cause of action within the meaning of section 20 (*c*) of the Civil Procedure Code and therefore, the Court at Madras will have jurisdiction. It is unnecessary to further pursue this matter since in paragraph 20 of the Judgment of the trial Court it has been clearly stated that issue No. (3) touching the jurisdiction of Court had not been argued before it. Consequently, it is unnecessary to go into this question. No other point was urged before us.

31. For the aforesaid reasons the dismissal of the suit O.S. No. 3216 of 1968 has to be upheld and consequently, A.S. No. 436 of 1976 is dismissed. Since the other suit instituted by the respondent, namely O.S. No. 7679 of 1971, has been held to be barred by limitation, that has also to be dismissed and consequently, A.S. No. 24 of 1975 is allowed. Each party is directed to bear its costs in the suits as well as the appeals.

S.J. ——— *A. S. No. 24 of 1975 allowed. A. S. No. 436 of 1976 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Charag Chemical Industries by Partner, N. Rajagopal, Industrial Estate, Ambattur .. *Appellant**

v.

R. G. Ganesan .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), sections 8, 10—Death of workman in factory in an accident in the course of his employment — Compensation paid to defendant's father by the Insurance Company under policy taken by employer in the name of the workman — Claim for compensation by the father of the deceased before the Additional Commissioner against employer independent of the compensation paid by the Insurance Company — Application by employer to implead Insurance Company as party rejected —Additional Commissioner holding employer liable to pay compensation—Appeal by employer to High Court—Payment by Insurance Company held not under the Workmen's Compensation Act—Employer liable to pay compensation through the Commissioner for Workmen's Compensation.

A workman employed in the appellant's factory received injuries in the course of an accident arising out of and in the course of his employment, which later resulted in his death on the same day. The appellant had taken policies of insurance in the name of the persons working in his factory including the deceased. The father of the deceased claimed that he was a dependant of the deceased and received the compensation from the Insurance Company. Not satisfied with this, he filed a claim under section 10 of the Workmen's Compensation Act before the Additional Commissioner for Workmen's Compensation for the payment of a lump sum compensation by the employer-appellant. The appellant objected to this claim on the ground that the father of the deceased had already received compensation from the Insurance Company under a policy taken out by the appellant.

* A.A.O. No. 117 of 1979.

30th December, 1980.

Further, the appellant filed an application before the Additional Commissioner to implead the Insurance Company as a party-respondent. However, the Insurance Company stated in reply that it was not a necessary party to the proceedings and it had already paid the compensation under the policy. Ultimately, the Insurance Company was not made a party. On a consideration of the merits of the claim, the Additional Commissioner computed that a sum of Rs. 9,780 was payable as compensation by the appellant. On appeal by the appellant against this order,

Held, The liability of the insurer to pay the amount to the assured under the policy cannot be said to arise under the provisions of the Workmen's Compensation Act. Therefore, it appeared that the provisions of the Act did not permit the filing of an application by the employer to implead the Insurance Company as a party to the proceedings in order to enable him to secure an indemnity against the Insurance Company. An examination of the provisions of the Act read in the light of the scheme and its intendment would disclose, that in proceedings before the Commissioner for Workmen's Compensation, an employer like the appellant could not file an application praying for impleading the insurance company with a view to secure an indemnity.

[*Para.* 11.]

On general principles of insurance law, it was most inapt that a person who had insured himself against loss by taking a policy in the name of the workman should nevertheless remain liable for the same, despite such insurance. But even so, such insurance was not statutory, nor was there any provision under the Act, which enabled the employer in such cases either to deny his liability or even to plead a payment by the insurer to the injured workmen or the dependants of a deceased workman towards a reduction of his liability with reference to the compensation ascertained as a result of the application of the provisions of the Act. Indeed, it was also necessary to note, that under section 8 of the Act, no payment of compensation in respect of a workman whose injury had resulted in death should be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer should be deemed to be a payment of compensation. The section,

as it stood, declared that payments except through the Commissioner for Workmen's Compensation were not recognised at all for purposes of the Act. The payment of amounts under the policy to the dependant of the deceased workman by the Insurance Company, in the present case, could be at best equated to be a payment by the Insurance Company on behalf of the employer without reference to the Commissioner for Workmen's Compensation and, therefore, such a payment could not be recognised at all for purposes of the Act. [*Para.* 12.]

Case referred to:—

State of Madras v. *B. G. P. Lorry Service,* (1960) 1 M.L.J. 351: I.L.R. (1960) Mad. 508: 73 L.W. 169: A. I. R. 1960 Mad. 336.

Appeal against the order of the Additional Commissioner for Workmen's Compensation II, Madras, dated 1st November, 1978 in W. C. Case No. 106 of 1977.

K. N. Balasubramaniam, for Appellant.

E. H. B. David, for Respondent.

The Court made the following

ORDER.—The appeal is directed against the order of the Additional Commissioner for Workmen's Compensation II, Madras in W. C. Case No. 106 of 1977, on an application filed by the respondent herein under section 10 of the Workmen's Compensation Act (hereinafter referred to as the Act). The case of the respondent was that his son G. Karunanidhi was a workman, employed in the factory of the appellant herein on a monthly wage of Rs. 150 and that on 28th June, 1977, G. Karunanidhi received injuries in the course of an accident arising out of and in the course of his employment, which later resulted in his death on the same day. The injury, according to the respondent, was sustained by his son while he fell down from the ceiling in the acid tub during the course of his employment. Claiming that the respondent is a dependant of late G. Karunanidhi and as such entitled to a lump sum compensation. to a sum of Rs. 13,500, the respondent herein filed an application in W.C. Case No. 106 of 1977 for an order directing the appellant herein to deposit the compensation.

2. That application was resisted by the appellant on the ground that the appellant had taken insurance policies in the name of the persons working in the establishment of the appellant including the deceased G. Karunanidhi and that his policy number was 9260900732, and that a sum of Rs. 10,000, had been received by the respondent as a compensation from the New India Assurance Company for the death of G. Karunanidhi and having received that amount, it is not open to the respondent to claim any other compensation under the provisions of the Act. The further case of the appellant was that the deceased G. Karunanidhi was working only as a casual labourer and would not come within the language of clauses in schedule II of the Act. The appellant also contended that the deceased G. Karunanidhi had done work which he was not authorised to do and, therefore, no compensation can be claimed on the basis that the injuries arose out of and in the course of his employment by the appellant. The monthly wages of the deceased G. Karunanidhi, according to the appellant, amounted to only Rs. 105. The objection that after receipt of compensation from the New India Assurance Company under the Janata Insurance Scheme, it is not open to the respondent to maintain a claim under the provisions of the Act was reiterated and the appellant prayed for the dismissal of the application.

3. Before the Additional Commissioner for Workmen's Compensation II, Madras, on 22nd August, 1978, the appellant filed an application to implead the New India Assurance Company as a party-second respondent to decide the quantum of compensation. On 25th August, 1978, notice of this application was ordered to the Insurance Company and in response to this, the Insurance Company in its reply, dated 7th September, 1978, stated that its presence as a party to the proceedings is not necessary as the claim of the party under the policy in question had been settled at Rs. 12,000 and that the policy issued by it was not under the provisions of the Act. Ultimately, the Insurance Company was not impleaded as a party-respondent to the proceedings before the Additional Commissioner for Workmen's Compensation II, Madras,

4. On a consideration of the merits of the claim, the Additional Commissioner for Workmen's Compensation II, Madras, held that the deceased G. Karunanidhi was a workman at the time of the accident as defined under the Act and that the accident arose out of and in the course of the employment and therefore, compensation is payable in respect of the death of G. Karunanidhi. Fixing the daily wage of the deceased G. Karunanidhi at Rs. 3.50, the deceased was held to fall within the wage group 60-90 under schedule IV of the Act and a sum of Rs. 9,780 was computed as the compensation payable by the appellant on account of the accident to G. Karunanidhi in 28th June, 1977, resulting in his death. It is the correctness of this order that is challenged by the appellant.

5. What is urged by the learned counsel for the appellant is that having taken a policy in the name of all the workmen in the establishment including the deceased G. Karunanidhi and paid the premium thereon with a view to cover any claim that may be made against the employer, the Insurance Company should have been made a party to the proceedings in order to effectively adjudicate upon the claim made by the respondent. That the appellant had insured the deceased G. Karunanidhi under the Janata Personal Accident Insurance Policy No. 9260900732 and had also paid the premium therefor and that under the terms of that policy, the respondent had already collected the amounts due are not in dispute. The question that has to be considered is, whether the presence of the Insurance Company is necessary as a party to the proceedings arising in a claim under section 10 of the Act. It will be useful in this connection to notice the intendment and the scheme of the Act. The preamble indicates that the object of the Act is to provide for payment of compensation by the employer for the injury or death by accident caused to the employees arising out of and in the course of such employment. Section 2 defines the several expressions used in the Act. Chapter II consisting of sections 3 to 18-A, deals with workmen's compensation. Section 3 is in the nature of a charging section as it were which gives rise to the employer's liability for compensation. Under section 3 (1), the employer incurs a liability to pay compensation to a workman, who receives a personal injury in an accident arising out of in the course of his employment. The compensation has to be paid in accordance with the provisions of Chapter II of the Act by the employer, who however, shall not be liable to pay compensation, if the case falls within any of the exceptions mentioned under the proviso to section 3 of the Act. A bar is imposed under section 3 (5) of the Act on a workman or his dependant from instituting a suit in a civil Court for damages, if a claim to compensation in respect of an injury has been filed before the Commissioner or if an agreement has been entered into between the parties for payment of compensation in respect of the injury. Section 4 of the Act provides for the determination of the amount of compensation payable to the injured workman or to the dependants of a deceased workman. Section 4-A directs the payment of compensation as soon as it falls due and provides for a penalty for default in such payment of the compensation awarded. The method of calculating wages in order to decide the quantum of compensation is provided for under section 5 of the Act. Under section 6, the Commissioner is empowered to review the order passed by him or the agreement entered into between the parties, on the application of either the employer or the workman. Section 7 deals with commutation of half monthly payments, while section 8 of the Act deals with the distribution of compensation. Section 9 of the Act prohibits the attachment, assignment or the creation of a charge on the lump sum or half monthly payment payable under the provisions of the Act. Section 10 of the Act prohibits the Commissioner from entertaining a claim for compensation unless notice in the manner provided under the Act as soon as practicable is given and unless the claim is preferred within two years from the date of the accident and in case of death, within two years from the date of the death. Under section 10-A of the Act, the Commissioner is entitled to require the employer to file statements regarding the fatal accidents where information is received by him from any source that a workman has died as a result of the accident arising out of and in the course of the employment. The employer has to file a statement indicating the reason or the grounds on which he disclaims such liability. Section 11 of the Act provides for the medical examination of an injured workman at the request of the employer before the expiry of three days

from the time of the service of notice on him under section 10 of the Act and the workman has to get himself examined by a qualified medical practitioner either on the request of the employer or as directed by the Commissioner. Section 12 of the Act is divided into four sub-sections. Section 12 (1) fastens liability on a principal to pay compensation to any injured workman employed in the execution of the work undertaken by a contractor under the principal or a sub-contractor. Under section 12 (2), a provision for indemnity is made. The principal who has to pay compensation to the injured workman or the dependants of a deceased workman employed by the contractor or sub-contractor, as the case may be, for the execution by or under the contractor or sub-contractor of the whole or any part of any work which is ordinarily part of his trade or business, is entitled under sub-section (2) of section 12 of the Act to be indemnified by the contractor or the sub-contractor, as the case may be, from whom the workman could have recovered compensation. Likewise, if the contractor under the principal was obliged under sub-section (1) to pay compensation to the injured workman or the dependants of a deceased workman employed by his sub-contractor, he shall be entitled to be indemnified by the sub-contractor from whom the workman could have recovered the compensation but for the provisions of sub-section (1). Disputes arising between the principal and his sub-contractor have to be resolved by the Commissioner and such questions may include the right to as well as the amount of such indemnity. If there is an agreement between the parties those terms would prevail, but otherwise, the matter has to be decided by the Commissioner. From sub-section (3), it is clear that the workman may proceed to recover compensation from the contractor who is his immediate employer instead of the principal. Under section 13 of the Act, provision is made for remedies of employer against strangers. The principal or the contractor, who had either to pay compensation or been called upon to pay an indemnity under section 12 in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof shall be entitled under section 13 to be indemnified by such person who is liable to pay damages. Section 14 of the Act deals with the insolvency of an employer and provides for a case where an employer who has entered into a contract with any insurer in respect of any liability under the Act to any workman, becomes an insolvent. Section 18-A of the Act provides for levy of penalties on the grounds specified in clauses (*a*) to (*d*) thereof.

6. Then we come to Chapter III which consists of sections 19 to 31 which provide for the appointment and powers of the Commissioners and the procedure to be adopted by them in the disposal of applications filed under the Act. Section 30 provides for an appeal in cases referred to in clauses (*a*) to (*e*) of the Act and section 31 provides for the mode of recovery of the amount of compensation just as an arrear of land revenue. Chapter IV comprising of sections 32 to 36 relates to the framing of the rules to carry out the purposes of the Act by the State as well as the Central Governments. Schedule I provides the list of injuries deemed to result in permanent total disablement as well as partial disablement. Schedule II catalogues the list of persons included in the definition of 'workman' provided under section 2 (1) (*n*) of the Act. In Schedules III and IV are given a list of occupational diseases and table of compensation payable in certain cases. This, in short, is the scheme and the intendment of the Act.

7. The only ground upon which the learned counsel for the appellant contends that the presence of the Insurance Company is necessary as a party to the proceedings is to secure an indemnity; as otherwise, the dependants of the deceased workman, as in the present case, will be enabled to secure a double advantage, as it were to themselves arising out of the same accident, giving rise to a claim for compensation. It must be remembered that a case under the provisions of the Workmen's Compensation Act, is not one under the general law and any claim for indemnity in the course of such a proceeding must be referable to some provisions of the Act. It is in this connection that sections 12, 13, 14 and 19 of the Act have to be closely and carefully examined to find out whether those provisions would in any manner support the claim of the appellant.

8. Section 12 (1) enables the injured workman or the dependants of a deceased workman to claim compensation against the principal although the injured or the deceased workman, as the case may be, was actually employed by the contractor who had undertaken to execute the work of the principal. Statutorily, the liability to pay compensation for the personal injury caused to the workman is fastened on the principal. The principal, for purposes of claiming compensation under the Act, is deemed to be the employer of the concerned workman. In order to attract section 12 (1) of the Act, the principal must have availed himself or engaged the contractor in the course or for the purpose of his trade or business for the execution of the whole or any part of his work. But as regards the amount of compensation payable by the principal, it has to be on the basis of the wages of the workmen under the employer by whom he is immediately employed. The provisions of section 12 of the Act would not be attracted where the accident occurs elsewhere than on, in or about the premises on which the principal has undertaken, or usually undertakes to execute the work or which are otherwise under his control or management. Though primarily the principal is the person liable to pay compensation to the workman, the injured workman or the dependants of a deceased workman appear to have been given a choice to proceed against the principal or the contractor or sub-contractor, as the case may be. There is no prohibition enacted imposing a bar on a workman from recovering compensation from the employer instead of the principal. The object of enacting section 12 appears to be to provide for cases where intermediaries between the principal and the injured or deceased workman are there in the execution of the work of the principal. Section 12 of the Act does not appear to have any application to a case where there is no contractor or sub-contractor working under the principal. Under section 3 of the Act, the injured workman or dependants of a deceased workman can claim compensation against the employer and the question of indemnity by the Insurance Company to the assured does not arise under section 12 (2) of the Act. The principal or the contractor obliged to pay compensation to the injured workman or the dependants of a deceased workman on the application of the provisions of section 12 (1) of the Act, is entitled to claim indemnity under sub-section (2) of section 12 of the Act. The immediate and actual liability to pay compensation to an injured workman is on the immediate employer of such workman and whoever pays for and on behalf of such employer by virtue of the statutory provisions of section 12 (1) will be entitled to be indemnified under sub-section (2) thereof. In the present case, there is no contractor or sub-contractor and admittedly, the deceased died in the accident while he was discharging his duties and the appellant is liable to pay compensation under section 3 of the Act and the dependant of the deceased workman had also filed an application before the Commissioner for compensation only against the appellant, as an employer. The insurer was, therefore, rightly not made a party respondent by the dependant of the deceased workman in the main application before the Commissioner claiming compensation.

9. Section 13 enables an employer who had to pay compensation to the injured workman or the dependants of a deceased workman under section 3 or under section 12 of the Act, by way of indemnification to proceed for recovery of damages against the insurer who is liable to pay the same as per the terms of the policy to the assured. That provision does not specify any particular mode or form for enforcing the right of the principal contractor the person who had to indemnify under section 12 against the third person who is liable to pay damages. The right, therefore, recognised under section 13 of the Act can only be enforced by resort to civil proceedings. Under this section, the Insurance Company which is liable to pay damages in respect of injury caused to the workman by an accident arising out of and in the course of his employment has to indemnify the person who had paid the compensation or had to pay indemnity under section 12 of the Act. The section by itself does not create any right in the workman or the dependants of a deceased workman to proceed for the recovery of damages against the insurance company. May be, as per the terms of the policy, the insurance company is primarily liable to pay damages to the assured in respect of personal injury caused to a workman by accident arising out

of and in the course of his employment. But this would not enable the appellant to claim an indemnity against the insurer by filing an application before the Commissioner for Workmen's Compensation under section 12 (2) of the Act or otherwise.

10. Section 14 provides for the contingency when the employer becomes an insolvent or the employer being a company is in the process of being wound up. In such a situation, the rights of such employer against the insurers in respect of the liability should be protected and the section provides that such rights shall be transferred to and vest in the workman. The insurers stand substituted in the place of the employer having the same rights and remedies and subject to the same liabilities of an employer. The insurers' liability, however, would be governed and restricted as per the terms of the policy. In such a case, the injured workman or the dependants of a deceased workman can have recourse directly against the insurers for the recovery of the compensation due and payable by them under the Act, but only if the circumstances specified in section 14 exist, and not otherwise. Section 14 operates only when the employer becomes an insolvent or the employer, if it is a company, has commenced to be wound up and in such an event, the claimants may be entitled to compensation directly from the insurer, who, in the circumstances, shall stand in the shoes of the employer having the same rights and remedies and also subject to the same liabilities as if it was the employer. Section 14 of the Act cannot, therefore, be invoked by the appellant to insist that the insurer must be made a party to the proceedings.

11. Section 19 of the Act may next be adverted to and that requires that the Commissioner has to decide the matters or questions specified therefor. The question to be decided by the Commissioner must be one arising in any proceedings under the Act and must relate to the liability of any person to pay compensation or as to the amount of duration of the compensation. Questions which would fall within the purview of the Commissioner for Workmen's Compensation for his decision are excluded from the jurisdiction of a civil Court under section 19 (2) of the Act. In the process of exercising powers under section 19 of the Act, the Commissioner is no doubt invested with all the powers of a civil Court for the purpose of taking evidence on oath and enforcing the attendance of witnesses and compelling the production of documents etc. Power to register agreements relating to the payment of compensation and to submit any question of law for the decision of the High Court and to review orders in appropriate cases have been conferred. But even so, such powers do not contemplate a decision on the question of the employer securing an indemnity from the insurance company. Indeed, any amount that would be realised by the employer or the assured from insurer by virtue of the terms of the policy cannot strictly be termed to be compensation within the meaning of the Act. The liability of the insurer to pay the amount to the assured under the policy cannot be said to arise under the provisions of this Act. Therefore, it appears that the provisions of the Act do not permit the filing of an application by the employer to implead the insurance company as a party to the proceedings in order to enable him to secure an indemnity against the insurance company. An examination of the provisions of the Act read in the light of the scheme and its intendment would disclose that in proceedings before the Commissioner for Workmen's Compensation, an employer like the appellant cannot file an application praying for impleading the insurance company with a view to secure an indemnity.

12. The second contention of the learned counsel for the appellant is that since the dependant of the deceased workman had already received the amount from the insurance company under the terms of the policy referred to earlier, it is not open to him to make a second claim as it were under the provisions of the Act in relation to the same circumstances giving rise to a claim for compensation. In other words, the submission is that though the employer has to pay the insurance premium for the injured workman working in his establishment, yet it would be incongruous that such an employer should be fastened with liability for injury to the workman. This is countered by the learned counsel for the respondent who contends that any payment

made even by an employer except through the Commissioner for Workmen's Compensation cannot be taken into account. No doubt, on general principles of insurance law, it is most inapt that a person who has insured himself against loss by taking a policy in the name of the workman should nevertheless remain liable for the same, despite such insurance. But even so, such insurance is not statutory, nor is there any provision under the Act which enables the employer in such cases either to deny his liability or even to plead a payment by the insurer to the injured workmen or the dependants of a deceased workman towards a reduction of his liability with reference to the compensation ascertained as a result of the application of the provisions of the Act. Indeed, it is also necessary to note that under section 8 of the Act, no payment of compensation in respect of a workman whose injury has resulted in death shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation. The section, as it stands, declares that payments except through the Commissioner for Workmen's Compensation are not recognised at all for purposes of the Act and this has also been so interpreted in *State of Madras, represented by the Collector of Madras and another* v. *B. G. P. Lorry Service and another*[1]. The payment of amounts under the policy to the dependant of the deceased workman by the Insurance Company, in the present case, can be at best equated to a payment by the Insurance Company on behalf of the employer without reference to the Commissioner for Workmen's Compensation and, therefore, such a payment cannot be recognised at all for purposes of the Act. No doubt, the provisions of section 8, as they stand, are rather harsh in that even an employer who, with a view to safeguard the interests of his workmen, insures them against the risk they are exposed to in the course of their employment, continues to be nevertheless liable for payment of compensation in respect of a claim made by the workman against him despite such insurance and a payment made by the insurer is also no payment for purposes of the Act. The amount secured by the injured workman or the dependants of a deceased workman does not even go towards reduction of the liability of the employer, though such employer pays the premium on the policies. But that is the effect of section 8 of the Act, as it is, and in the absence of any provision in the Act to give effect to those payments, any payment made by the Insurance Company to the injured workman or the dependants of a deceased workman cannot be recognised for the purpose of the Act at all. Under these circumsstances, it is not possible to accept the contention of the learned counsel for the appellant. The result is, the civil miscellaneous appeal fails and is dismissed. No costs.

S.J. ——— *Appeal dismissed.*

1. (1960) 1 M.L.J. 351: I.L.R. (1960) Mad. 508: 73 L. W. 169: A.I.R. 1960 Mad. 336.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Natarajan, J.*

Land Acquisition Officer and Special Deputy Collector, Rural Housing, Pattukottai .. *Appellant**

v.

Adheenakarthar Thiruvaduthurai Adheenam and others .. *Respondents.*

Land Acquisition Act (*I of* 1894), *sections* 9 *and* 25 (2)—*Proceedings for acquisition initiated against temple lands—Notice under section* 9 (3) *issued on 27th December,* 1973—*Enquiry held on 7th January,* 1974 — *Enquiry held within* 15 *days of notice* — *Award passed on 9th January,* 1974—*Claim statement dated* 10*th January,* 1974 *received on* 16*th January,* 1974 *by the Land Acquisition Officer* — *Reference under sections* 30 *and* 31 *of the Act* — *Contention by State of claimant filing claim petition only after the award and therefore not entitled to claim higher compensation* —*Enquiry held within* 15 *days of the issue of notice under section* 9 (3), *held not valid* —*Claimant entitled to higher compensation.*

The Land Acquisition Officer initiated acquisition proceedings against land belonging to a temple deity represented by the hereditary trustee. The notice issued by Land Acquisition Officer under section 9 (3) of the Land

* A.S. No. 279 of 1978.

31*st October,* 1980.

Acquisition Act, was on 27th December, 1973. The date of enquiry was fixed on 7th January, 1974 *i.e.*, within a period of 15 days from the date of notice. The award was passed on 9th January, 1974. The temple filed its claim petition dated 10th January, 1974, received by the Land Acquisition Officer on 16th January, 1974. The Land Acquisition Officer referred the matter under sections 30 and 31 of the Land Acquisition Act, to the Court. Before the Court, the State contended that the temple sent its claim petition claiming higher compensation only after the award was passed and therefore the temple was not entitled to any higher compensation. However this contention of the State was rejected by the District Judge who allowed a higher compensation to the temple. On appeal by the State,

Held, it is now well-settled that the serving of personal notice under sub-section (3) of section 9 should conform to the directions contained in sub-section (2) regarding the interval to be given between the date of notice and the date of hearing. [*Para*. 9.]

The application of the interdict contained in sub-section (2) of section 25 depended upon the valid service of notice under section 9 (3) read with section 9 (2) of the Act. As in the case of public notice under section 9 (2), in the case of private notice under section 9 (3) as well, there must be an interval of at least 15 days before the date of service of notice and the date of the enquiry. If that requirement was not complied with, then the failure, of the complainant to the claim statement regarding the valuation within the time given in the notice or even before the passing of the award, would not disentitle him to claim higher compensation. [*Para*. 10.]

The notice would not amount to a valid notice under section 9 (3), because the enquiry has been fixed within a period of 15 days. If in response to such an invalid notice, the temple had not filed a claim statement before the passing of the award, the State could not legitimately contend that the temple had deliberately failed to file the claim statement within the time given to it. [*Para*. 10.]

Cases referred to:—

Secretary of State v. *Sohan Lal*, (1918) 44 I.C. 883; *Venkatarama Ayyar* v. *Collector of Tanjore*, (1930) I.L.R. 53 Mad. 921: 32 L. W. 363: A.I.R. 1930 Mad. 836; *Lal Saheb* v. *State*, A.I.R. 1975 Orissa 126; *The Revenue Divisional Officer* v. *A. R. Damodaran*, (1978) 1 M.L.J. (N.R.C.) 1: 91 L. W. 352; *Special Land Acquisition Officer* v. *S. P. Patil*, A.I.R. 1974 Karn. 74; *S. S. M. Vidwa Poshaka Sangham* v. *Special Tahsildar*, 1975 A.L.J. 207.

Appeal against the decree of the District Court, Pudukottai, dated 16th February, 1978, and passed in L.A.O.P. No. 47 of 1974.

The Government Pleader, for Appellant.

B. Kumar, for Respondents.

The Court made the following

ORDER.—The State has preferred this appeal against the order of the District Judge of Pudukottai in L.A.O.P. No. 47 of 1974 on the file of his Court. The said petition related to a reference made under sections 30 and 31 of the Land Acquisition Act, by the Land Acquisition Officer (Special Deputy Collector—Rural Housing) Pattukottai. The facts in brief are as follows: An extent of 1.22 acres of wet land in Survey No. 252|5 in No. 157, Avudayarkoil, Aranthangi Taluk, belonging to the Deity Sri Athmanathaswamy was acquired by the Government for a public purpose to wit providing house sites to landless rural workers. The land acquisition proceedings were initiated by means of a notification under section 4 (1) of the Land Acquisition Act in 1973. An enquiry under section 9 of the Act was held on 7th January, 1974. at the Special Deputy Collector's office at Pattukottai. On that day the agent of the Adheenakarthar of the Thiruvaduthurai Adheenam (hereinafter referred to as the Adheenam) who is the hereditary trustee of Sri Athmanathasamy Devasthanam of Avudayarkoil appeared before the Land Acquisition Officer and filed an objection statement Exhibit R-1 given by the Adheenam and also gave a formal statement Exhibit R-2 regarding the filing of Exhibit R-1. The Land Acquisition Officer passed an award on 9th January, 1974, fixing the compensation of Rs. 34.40 per cent. and granted total compensation of Rs. 4,837.55. On 10th January, 1974, the Adheenam sent a petition, Exhibit R-3 to the Land Acquisition Officer

stating that the price of the wet land in the area of acquisition was Rs. 150 per cent. and as such the Officer should award compensation at that rate for the land sought to be acquired. In support of such a statement the Adheenam sent registration copies of two sale deeds, Exhibits P-1 and P-2. The Land Acquisition Officer refused to consider the request for higher compensation on the ground that he had already pronounced the award on 9th January, 1974.

2. As the acquired land belonged to the Deity and as the Adheenam was only a hereditary trustee and had no alienable right over the properties, the Land Acquisition Officer made a reference under sections 30 and 31 of the Act and deposited the compensation amount in Court and left it to the Court to deal with the disbursement of the amount.

3. The Adheenam filed a counter statement before the Court and stated that the Land Acquisition Officer should have awarded compensation at the rate of Rs. 150 per cent. and he having not done so, the Court may enhance the compensation amount to that rate.

4. The State opposed the claim of the Adheenam for payment of higher compensation and contended that since the Adheenam had failed to make a claim for higher compensation before the award was passed, it was not entitled to ask for higher compensation and in any event the rate claimed was excessive. The learned District Judge framed the following question:

"Whether the claimant is entitled to get enhanced compensation, and if so, to what amount?"

5. Before the learned District Judge P.W. 1, an Inspector in the Avudayar Devasthanam was examined on the claimant's side and Exhibits P-1 and P-2, sale deeds were marked in evidence. For the State, the Village Karnam was examined as P.W. 1 and Exhibits R-1 to R-5 were filed. The District Judge held that in spite of the Adheenam having sent the petition, Exhibit 3, claiming higher compensation only a day after the award was passed the Adheenam was not estopped from claiming higher compensation and the Adheenam cannot be deemed to have given up its right to ask for higher compensation. Proceeding then to determine the value of the land the District Judge placed reliance on Exhibit P-2 and fixed the compensation amount to Rs. 100 per cent. and passed orders accordingly. It is the correctness of that order, which is challenged by the Government in this appeal.

6. The principal contention of the learned Additional Government Pleader was that the District Judge had failed to notice the interdict contained in sub-section (2) of section 25 of the Act and consequently, his action in granting enhanced compensation to the Adheenam, is against law. Elaborating his contention, the Additional Government Pleader stated that Exhibit R-3 petition had been sent only on 10th January, 1974, and had been received by the Land Acquisition Officer only on 16th January, 1974, whereas the award had been passed on 9th January, 1974, itself and consequently, it was a case where the Adheenam had omitted to make a claim for higher compensation within the prescribed time. It was further submitted that the Adheenam had also failed to adduce sufficient cause for the non-filing of the claim statement within time and hence the civil Court had no power to condone the omission and examine the Adheenam's claim for payment of higher compensation. The second argument related to the fixation of the compensation amount at Rs. 100 per cent.

7. In support of the first argument the Additional Government Pleader cited the decision in *Secretary of State* v. *Sohan Lal*[1]. In that case, the facts were as follows:—In a land acquisition matter, the Collector caused notice to be served on the owner of one of the items of the acquired lands by name, Sohan Lal for an award enquiry proposed to be held on 20th July, 1912. Sohan Lal failed to make a claim for payment of higher compensation before the Collector before the said date. However, the award enquiry was not held on 20th July, 1912, but was adjourned

1. (1918) 44 I.C. 883.

to a later date, because no notices could be served on some of the owners of the other items of lands, which were also acquired. In the meanwhile Sohan Lal appeared before the Collector on 21st August, 1912, and gave a petition for payment of compensation at a higher rate. The Collector passed an award thereafter and since Sohan Lal was not satisfied with the award, he asked for a reference to the civil Court under section 18 of the Land Acquisition Act, and a reference was accordingly made. It was contended on behalf of the Government that since Sohan Lal had failed to make his claim statement on or before 20th July, 1912, he was not entitled to ask for a higher compensation than what had been awarded by the Collector. A Division Bench of the Punjab Chief Court, overruled the objection and held that since Sohan Lal had filed his statement for higher compensation before the award was passed, he was not barred in law from disputing the correctness of the compensation amount fixed by the Collector. A converse inference is therefore, sought to be raised to contend that since the claim statement had not been filed by the Adheenam on or before 9th January, 1974, the Adheenam was not entitled to dispute the correctness of the award passed by the Land Acquisition Officer. The contention of the learned Additional Government Pleader cannot be accepted for more than one reason.

8. For determining the scope of section 25 (2) of the Act, reference must be made to the several sub-sections of section 25 as well as section 9 of the Act. Section 25 reads as follows:—

"25. *Rules as to amount of compensation.*—
1. When the applicant has made a claim to compensation pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11.

2. When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector.

3. When the applicant has omitted for a sufficient reason (to be allowed by the judge) to make such claim, the amount awarded to him by the Court shall not be less than and may exceed the amount awarded by the Collector.

From the terms of the section it may be seen that the three sub-sections contemplate three different situations. Sub-section (1) deals with the cases where a claimant pursuant to a notice given under section 9 has made a claim for higher compensation within the time given to him. In such a case, the Court can award higher compensation to him in a reference made under section 18 of the Act, but the powers of the Court are circumscribed within the limits of the compensation amount awarded by the Collector or Land Acquisition Officer on the one hand, and the amount claimed by the claimant in his claim petition on the other. In other words, the Court cannot award compensation amount less than what has been awarded by the Collector himself nor can it award a compensation higher than what has been claimed by the claimant himself. Sub-section (2) deals with those cases where the claimant has refused to make a claim statement for higher compensation or has failed without sufficient reason to make a claim statement. In such cases, the Court has no powers to disturb the compensation awarded by the Collector. To put it differently the Court cannot concede the request of the claimant for a higher compensation irrespective of the merits of his contentions. Sub-section (3) deals with those cases where a claimant has omitted for a sufficient reason to make claim statement within the time given to him by the Collector. The reason for his failure to make the statement must be found to be sufficient by the civil Court. If the Court finds that the failure to make the statement was on account of a sufficient or justifiable reason, the Court has the power to overlook the non-filing of the claim statement within time and award a higher rate of compensation to the claimant. It is apposite to mention here that sub-section (3) deals with those cases alone, where the claimant has omitted for sufficient reason to make a claim statement within the time given to him by the Collector and not to those cases where the claimant has deliberately refused to make a claim statement.

9. Coming now to section 9, it reads as follows:—

"9. *Notice to persons interested.*—
1. The Collector shall then cause public notice to be given at a convenient place on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land, may be made to him.

2. Such notice shall state the particulars of the land so needed and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice) and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.

3. The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein or entitled to act for persons so interested as reside or have agents authorised to receive service on their behalf within the revenue district in which the land is situate.

4. In case any person so interested resides elsewhere and has no such agent the notice shall be sent to him by post in letter addressed to him at his last known residence address or place of business and registered under Part III of the Indian Post Office Act, 1866".

From the section it may be seen that sub-section (1) deals with the causing of a public notice. Sub-section (2) besides stating what the contents of the notice should be imposes an obligation on the Collector to fix the date of hearing at least 15 days after the date of publication of the notice. Sub-section (3) deals with service of personal notice on the occupier, if any, of the land and on all such persons known or believed to be interested therein, etc. Sub-section (4) deals with the the service of notice on persons residing elsewhere and who have no agent at the place where the land is situate.

9. It is by now well-settled that the serving of personal notice under sub-section (3) of section 9 must also conform to the directions contained in sub-section (2) regarding the interval to be given between the date of notice and the date of hearing. I may refer to some decisions on this aspect of the matter. In *Venkatarama Ayyar* v. *Collector of Tanjore*[1], it has been held by this Court that in respect of notices under section 9 (3) of the Act also, there must be an interval of at least 15 days between the date of service of such notice and the date when the claimants are required to state their objections and claims. The same ratio has been laid down in *Lal Saheb* v. *State*[2] and in *The Revenue Divisional Officer, Chidambaram* v. *A. R. Damadara Mudaliar, Managing Trustee of Patalewarar Devasthanam, Tiruppapuliyur*[3].

10. The further thing to be noticed is that the application of the interdict contained in sub-section (2) of section 25 depends upon the valid service of notice under section 9 (3) read with section 9 (2) of the Act. We have already seen, as is the of public notice under section 9 (2), in the case of private notice under section 9 (3) as well, there must be an interval of at least 15 days before the date of service of notice and the date of the enquiry. If that requirement is not complied with, then the failure of the complainant to file claim statement regarding the valuation within the time given in the notice or even before the passing of the award, will not disentitle him to claim higher compensation. This view has been uniformly taken by several Courts over a long number of years, and it has become a settled proposition by now. The reported cases on this matter are as given under: *Venkatarama Ayyar* v. *Collector of Tanjore*[1], *Special Land Acquisition Officer* v. *S. P. Patil*[4]; *Lal Saheb* v. *State*[2]; *S. S. M. Vidwa Poshaka Sangham* v. *Special Tahsildar*[5] and *The Revenue Divi-*

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1. (1930) I.L.R. 53 Mad. 921: 32 L. W. 363: A.I.R. 1930 Mad. 836.
2. A.I.R. 1975 Orissa 126.
3. (1978) 1 M.L.J. (N.R.C.) 1: 91 L.W. 352.
4. A.I.R. 1974 Karn. 74.
5. 1975 A.L.J. 107.

sional Officer, Chidamabaram v. *A. R. Damodara Mudaliar, Managing Trustee of Pataleswarar Devasthanam, Tiruppapuliyur*[1]. Hence if the contention of the State is to be accepted, the State must prove that valid notice under section 9 (3) giving clear interval of 15 days between the date of service of notice and the date of enquiry had been given effect to on the Adheenam. It is from this perspective, the contention of the State has to be examined. Admittedly, the notice issued by the Land Acquisition Officer under section 9 (3) of the Act was on 27th December, 1973. The date of enquiry has been fixed as 7th January, 1974, *i.e.*, within a period of 15 days from the date of notice. Even assuming that the notice was served on the date of its issue itself, for which inference there is no material in this case, it still follows that the notice will not amount to a valid under section 9 (3), because the enquiry has been fixed within a period of 15 days. If in response to such an invalid notice, the Adheenam had not filed a claim statement before the passing of the award, the State cannot legitimately contend that the Adheenam had deliberately failed to file the claim statement within the time given to it and such lapse must be construed as an inexcusable one. Consequently, it follows that the contention put forward by the Additional Government Pleader, cannot be sustained. In the instant case, there is additional material to discountenance the objection raised by the State. In response to the notice, dated 27th December, 1973, the Adheenam had sent a petition, Exhibit R-1 raising objections therein to the very acquisition of the land. The objection raised by the Adheenam was that the land sought to be acquired was a valuable piece of wet land and the Deity was already depleted of its holdings by reason of the Land Ceiling Act, etc., and as such the acquisition proposal should be dropped. This objection has been overruled by the Land Acquisition Officer by means of a letter, dated 7th January, 1974, the copy of which is strangely not to be found in the file produced by the Additional Government Pleader. Even so, the subsequent objection, Exhibit R-3, dated 10th January, 1974, sent by the Adheenam makes reference to the communication sent on 27th January, 1974 by the Land Acquisition Officer. Significance must be attached to the letter, dated 7th January, 1974, by the Land Acquisition Officer, because the Adheenam would have thought that it was only thereafter it should have filed a statement regarding the compensation amount for the land. From this point of view also, the State's contention is untenable.

11. Mr. B. Kumar, learned counsel for the Adheenam advanced an argument stating that in as much as the land belongs to the Deity, the sending of a notice to the Adheenam under section 9 (3) cannot be considered to be a valid notice, and on that ground too the reliance of the Additional Government Pleader on the notice, dated 27th December, 1973, is misconceived. I do not think there is merit in this argument, because the Adheenam is the hereditary trustee of the deity and is therefore competent to receive notice on behalf of the deity. It is further seen that the Land Acquisition Officer had originally sent a notice to the Executive Officer of the Devasthanam and since he declined to receive the notice, the Land Acquisition Officer had to issue the notice to the Adheenam.

12. Once the legal objection raised to the grant of enhanced compensation is overruled, the only other question remaining for consideration is about the correctness of the quantum of compensation fixed by the District Judge.

13. On this aspect of the matter the Adheenam has filed two sale deeds, Exhibits P-1 and P-2. Under the former sale deed, the rate works out to Rs. 150 per cent. and under the latter sale deed the rate works out to Rs. 97 per cent. Though Exhibit P-2 is later in point of time, it is somewhat odd that the sale of land is for a lower rate than what is contained in Exhibit P-1. Be that as it may it is in evidence that lands sold under Exhibits P-1 and P-2 are also situate in the same ayacut in which the acquired land is situate and all of them are of the same tharam and bear the same amount of kist. It has been stated by R.W. 1 in evidence that the lands sold under Exhibits P-1 and

1. (1978) 1 M.L.J. (N.R.C.) 1: 91 L.W. 352.

P-2 adjoin an important road, *viz.*, Mimisal-Arantangi Road, while the acquired land adjoins only a Panchayat Union Road, *viz.*, Pattukottai road. The difference in the respective locations of the lands, cannot loom large or have any impact, because admittedly the acquired land also has good road frontage. As all the lands are situate in the same ayacut the distance between the lands sold under Exhibits P-1 and P-2 on the one hand, and the acquired land, on the other cannot be much. Moreover, it is seen that even in the year 1972, the price of the land was Rs. 150 per cent. It was at that rate the Adheenam claimed the compensation. In such circumstances the fixation of the compensation amount at Rs. 100 per cent. by the District Judge cannot be said to be excessive. Therefore, the second contention of the Government should also fail.

14. The resultant position is that the appeal preferred by the State has to fail. Accordingly, it will stand dismissed with costs. Counsel's fee is fixed at Rs. 250.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Perumal and others .. *Petitioners**

v.

Ramachandra Padayachi and others .. *Respondents.*

Limitation Act (XXXVI of 1963), Articles 134, 136; Civil Procedure Code (V of 1908), section 47—Decree-holder auction-purchaser applying to Executing Court for delivery of property—Application filed within one year from the date when the sale was made absolute—Delivery could not be taken due to door being locked in one case and due to obstruction in another case—Applications dismissed—Fresh applications for delivery made beyond one year period from the date of confirmation of sale, if maintainable—Article 136 of the Limitation Act (1963), held to apply—Applications maintainable.

Two decree-holder-auction-purchasers applied to the Executing Court for delivery of the respective properties within one year from the date when the sale was made absolute. The executing Court ordered delivery. But delivery could not be taken due to the door being locked in one case, and due to obstruction in the other case. Ultimately the Execution applications were dismissed. Meanwhile, more than a year had passed from the date of confirmation of sale. The purchasers filed fresh applications for delivery. The judgment-debtor thereupon raised the plea that the present application for delivery was beyond one year and therefore barred by time. The judgment-debtor relied on Article 134 of the Limitation Act. The plea was upheld by the Court below in one case and in the other, the plea was rejected. Revision petitions to the High Court were filed by the purchaser in one case and the judgment-debtor in the other case,

Held, what the decree-holder-purchaser in each of these cases asked for was not an order for delivery, which *ex hypothesi,* he had already obtained in the earlier application. He had approached the Court with the present application for executing the earlier order for delivery passed by that very executing Court. In this sense, therefore Article 134 of the Limitation Act, could not have any application, for that Article only applied to an application for delivery. It did not apply when that application had already been ordered and something had to be done with that order and pursuant to that order. In this view, Article 136 was the proper provisions to be applied, because that Article applied not only to a decree, but also to an order of a Court, which was executable as an order. [*Para.* 6.]

An order for delivery passed by an executing Court in favour of a Court-auction-purchaser

*C.R.P. Nos. 347 of 1977 and 709 of 1980. *12th December,* 1980.

is executable as an order within the time prescribed by Article 136, Limitation Act. [*Para.* 11.]

It has been held time and again that a decree-holder-purchaser was no better than a third party auction-purchaser. In *Explanation* 2 (*s*) to section 47, Civil Procedure Code, as amended by Amendment Act CIV of 1976, all questions relating to delivery of possession of such property to a purchaser at a sale in execution of a decree should be deemed to be questions relating to the execution, discharge or satisfaction of a decree within the meaning of section 47 (1) (Civil Procedure Code). Section 47 (1) enacted that all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree should be determined by the Court executing the decree, and not by a separate suit. These provisions showed that an auction-purchaser, whether he was a decree-holder or not, was inextricably forced to agitate his rights and pursue his remedies only in execution proceedings. [*Para.* 13.]

With the complete abandonment of section 48, Civil Procedure Code, and Article 182 of the Limitation Act of 1908, Courts are now relieved from finding out whether any given application was a step-in-aid of execution or was a continuation or revivor of an earlier execution application. [*Para.* 5.]

Cases referred to:—

Sree Rajah Vadrevu Viswasundara Rao Bahadur v. *Vannan Paidigadu,* (1926) 50 M.L.J. 72: 23 L.W. 472: A. I. R. 1926 Mad. 385; *Ramakrishnayya* v. *Venkata Subba Rao,* (1954) 2 M.L.J. 89: A.I.R. 1954 Mad. 831; *Nalluru Kottaya* v. *Narayana,* (1943) 2 M.L.J. 450: A.I.R. 1944 Mad. 60; *Nandan Subbaya* v. *Raja Venkataramayya Appa Rao,* (1918) 7 L.W. 16.

Petition under section 115 of Act V of 1908 to revise the orders of (1) District Munsif of Cuddalore, dated 9th July, 1976, in E.A. No. 175 of 1976 in O.S. No. 1478 of 1970 (C. R.P. No. 347 of 1977); (2) Sub-Court, Thanjavur, dated 25th January, 1980 in E. A. No. 390 of 1979 in O.S. No. 22 of 1970.

G. Subramaniam and *D. Mukundan*, for Petitioners.

The Advocate-General *R. Krishnamoorthy*, *R. Muthukumarasaamy* and *S. Sethuraman*, for Respondents.

The Court delivered the following

JUDGMENT.—These two civil revision petitions although heard at an interval of a week or two in between are disposed of by this common judgment, considering that both of them raise an identical point of limitation. Each is a case where the holder of a money decree purchases a judgment-debtor's property in execution sale. After confirmation of the sale in his favour, the decree-holder-purchaser applies to the executing Court for delivery. The application is filed within a period of one year from the date when the sale is made absolute. This is the prescribed period for an application of this kind under Article 134 of the Schedule to the Limitation Act, 1963. On this application by the decree-holder-purchaser, the Court orders delivery. But, for some reason or other, the purchaser does not succeed in obtaining actual delivery. The delivery warrant is returned unexecuted. In the one case, the judgment-debtor makes himself scarce, and the property is found under lock and key, and the purchaser does not move the Court for an order for breaking open the lock for gaining entry. In the other case, an obstructor stands in the way of the delivery warrant being executed. Whichever be the cause, the application of the decree-holder-purchaser gets ultimately dismissed by the executing Court. Subsequently, the purchaser moves the Court once again for delivery. This time the way is clear for obtaining delivery. In the one case, the property is apparently no longer under lock and key. In the other case, the obstructor's obstruction is by then removed out of the way. Meanwhile, however, more than a year has passed since the confirmation of the sale. It is this time-lag which has been taken advantage of by the judgment-debtor in each case. His contention is that the present application for delivery filed by the decree-holder-purchaser is barred by limitation. He relies on Article 134 of the

Schedule to the Limitation Act, 1963. This plea in bar has been upheld by the Court below in the first of the cases now before me. The Court which dealt with the other case, however, took a different view, holding that the subsequent application by the decree-holder-purchaser is not barred by limitation although it was filed after the expiry of one year from the date when the sale in his favour became absolute. The question for my consideration in these two revisions is which is the correct view about limitation?

2. The learned Advocate-General put the case for the purchaser very simply. Much the same argument was addressed by Mr. R.S. Venkatachari for the purchaser in the other case. The argument was based on what was common ground between the parties. In each case an application for delivery was admittedly filed in time by the decree-holder-purchaser, that is to say, within one year from the date when the sale became absoute. Admittedly, again, on that application the executing Court passed an order for delivery. Subsequently, no doubt, that application was dismissed, but the dismissal of that application did not alter the fact that the Court had in fact ordered delivery at an earlier stage. It follows that having obtained an order for delivery, the subsequent application filed by the purchaser cannot be regarded as an application for an identical relief, namely, for an order for delivery, for the simple reason that the Court had already passed an order for delivery. In these events, the application of Article 134 is out of the question. That Article only prescribes the time-limit for an application for delivery by a purchaser of an immovable property at an execution sale. It does not deal with an application filed by the purchaser to effectuate an order of delivery passed by the executing Court. In other words, the purchaser's application, which is now in question, is not an application for delivery but an application for executing the order of delivery already passed by the executing Court. In this view, Article 134 is not the governing Article. The pertinent provision is to be found in Article 136. That Article prescribes the period of limitation for an application to execute either a decree or an order passed by a civil Court. An order for delivery passed by an executing Court is itself an executable order in the same way as a decree for possession passed by a Court in a suit for possession is an executable decree. If Article 136 is the appropriate Article, admittedly the present application is within time. Article 136 provides that an application for executing a decree of an order of a civil Court must be filed within 12 years from the date when the decree or order became executable. In this case, admittedly, the application now in question has been filed by the decree-holder-purchaser well within this period of 12 years. There is therefore, no question of bar of limitation. This is the line of argument pursued by the learned Advocate-General.

3. Mr. Vanchinathan, learned counsel appearing for the judgment-debtor in C.R.P. No.347 of 1977 and Mr. Subramaniam appearing for the other judgment-debtor in C.R.P. No.709 of 1980, submitted that the contentions put forward on behalf of the decree-holder-purchaser are novel and opposed to the traditional manner in which this question has been dealt with and disposed of by our Courts in the past. They cited, as illustrative cases, two Division Bench rulings of this Court in *Sree Rajah Vadrevu Viswasundara Rao Bahadur* v. *Vannan Paidigadu*[1] and *Ramakrishnayya* v. *Venkatasubba Rao*[2] and also a decision of a single Judge in *Nalluru Kottaya* v. *Narayana*[3]. These cases, it may be observed, dealt with a typical problem of a decree-holder-auction-purchaser obtaining an order for delivery on an application filed by him within time, on the basis of which, however, he was unable to obtain actual physical possession of the property for some reason or other with the result that he is found approaching the Court once again for that purpose. How the Courts have approached the problem in all the above decisions is to draw a distinction between two kinds of cases. In one kind of case, the decree-holder-purchaser is thwarted in his attempt to obtain actual physical delivery, owing to reasons beyond his control, or by obstruction caused either by the judgment debtor or by a third party. In the other kind of case, the Court having once passed an order for delivery in favorur of the purchaser, nevertheless ultimately dismisses his application because of laches on the part

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1. (1926) 50 M.L.J. 72: 23 L.W. 472: A.I.R. 1926 Mad. 385.
2. (1954) 2 M.L.J. 89: A.I.R. 1954 Mad. 831.
3. (1943) 2 M.L.J. 450: A.I.R. 1944 Mad. 60.

of the auction-purchaser. The Courts have held that in the former case a subsequent application for delivery although, as a matter of computation it is beyond the time prescribed for an application for delivery, must yet be regarded as a revivor or a continuation of the earlier application for delivery, which *ex hypothesi*, is filed within time. In the other kind of case, the Courts have expressed the view that the subsequent application must be dismissed since the purchaser is entirely to be blamed for not pursuing the order for delivery in his earlier application.

4. The question of limitation has been discussed in all the earlier cases in the books in the context of the relevant provisions of the Indian Limitation Act, 1908. Article 182 of the first Schedule to that Act corresponds to Article 134 of the schedule to the present Limitation Act, 1963, excepting for the difference that instead of one year which is now the governing period of limitation, the Legislature had prescribed three years under the earlier statute. There is another and more fundamental change in the two Acts as respects the period of limitation prescribed for executing a decree or order of a civil Court. In the earlier Limitation Act, 1908, a distinction was drawn between decrees and orders of a Chartered High Court, on the one hand, and decrees and orders of other civil Courts on the other. Article 194 of the Indian Limitation Act, 1908 which prescribed the period of limitation for executing decrees and orders of civil Courts other than Chartered High Courts provided for a period of three years as a period of limitation for execution applications. But, the starting point of limitation under that Article was subject to a complicated set of rules, laid down in the third column of the Schedule. The Article was also subject to the provisions of section 48, Civil Procedure Code—which, briefly stated, provided an over-all time-limit upto 12 years for any application in execution. The Limitation Act of 1963 had done away with the distinction between a decree or order of the Chartered High Court and a decree or order of other Courts in the matter of execution. It had also repealed section 48 of the Code, prescribing a uniform period of 12 years as the period of limitation for all execution petitions. Notwithstanding these important changes in the statute-law, learned counsel appearing for the judgment-debtors in these cases urged that the authoritative decisions rendered by this Court under the Indian Limitation Act, 1908, would still hold good, even under the present dispensation.

5. I cannot accept the view that the substantial changes made in the law of limitation by the repealing and re-enacting legislation of 1963, must be ignored and the Court must proceed to apply the decisions rendered under the repealed enactment without question even in situations arising under the law as it stands re-enacted. The Indian Limitation Act of 1908 was repealed and a new statute of limitation was brought into being on the basis of the recommendations contained in the third Report of the Law Commission. The Law Commission *inter alia*, expressed the view that Article 182 of the Indian Limitation Act, 1908, was a fruitful source of litigation. They recommended that it had better be given up. They also felt that there should be a single and simple period of limitation for execution of decrees and orders of all civil Courts without any distinction whatever between one kind of Court and another. At the same time, again on the basis of the recommendations of the Law Commission, the period of three years prescribed under the Act of 1908 for an application for delivery by a purchaser in an execution-sale was to be reduced to one year. One of the pre-occupations of Courts administering the earlier law of limitation relating to execution was to find out whether any given application in execution was a step-in-aid of execution, or was a continuation or was a revivor of an earlier execution application. With the complete abandonment of both section 48 of the Civil Procedure Code and of the provisions contained in Article 182 of the Act of 1908, the Courts of the present day, I believe, are relieved of these old-time obsessions. After the repeal and re-enactment of the law of limitation under the Limitation Act of 1963, the task of the Courts is to apply Article 136 to all applications to execute a decree or order of a civil Court, untrammelled by the previous case-law on the subject having a bearing on the since repealed provisions of the Indian Limitation Act, 1908. I, therefore, accept the line of approach argued for by the learned Advocate-General as the only proper way of applying the law of limitation to cases arising under the present Act.

6. In both the cases under revision the central fact remains that the decree-holder-auction-purchaser did file his application for delivery in due time within a period of one year from the date when the sale became absolute. Not only that, the Court on that application actually made an order for delivery. The purpose of the application was, therefore, served with the passing of the order for delivery. What remained thereafter was only the ministerial act of putting into effect the said order for delivery. A situation of this kind had its parallel in proceedings in execution of a decree passed in a suit for possession. Where a decree for possession is passed, that decree is an executable decree. Likewise, an order for delivery passed in favour of an auction-purchaser is an executable order. What the decree-holder-purchaser in each of these cases asks for is not an order for delivery, which *ex hypothesi*, he had already obtained in the earlier application. He has approached the Court with the present application only for executing the earlier order for delivery passed by that very executing Court. In this sense, therefore, Article 134 cannot have any application. For, that Article only applies to an application for delivery. It does not apply when that application had already been ordered and something has to be done with that order and pursuant to that order. In this view, Article 136 is the proper provision to be applied, because that Article applies not only to a decree, but also to an order of a Court, which is executable as an order. There can be no doubt that an order for delivery passed by an execution Court in favour of an auction-purchaser is executable in the same way as a decree for possession is executable. It may be that in the very application filed by an auction-purchaser for delivery, and as a follow-up proceeding, the warrant of delivery may be successfully executed. But, the law of limitation does not prevent an independent and substantive application being filed to execute the order for delivery passed by an executing Court. There is nothing in Article 136 of the Schedule to the Limitation Act, 1963, which excludes such executable orders from execution.

7. I am therefore, of the view that in both these cases the subsequent application was filed within time, since both of them were filed within a period of 12 years from the respective dates when the order for delivery was made. Both the applications must be regarded as applications to execute the earlier order of delivery duly passed by the executing Court on applications which were themselves filed within the period limited by Article 132.

8. In this view based on the construction and application of the clear words of Articles 132 and 134 of the Limitation Act, 1963, it would be unnecessary to enter into a further discussion to find out whether the ultimate dismissal of the earlier application for delivery was owing to the default of the decree-holder-purchaser, or whether it was due to circumstances beyond his control. That kind of discussion would have been apposite under the law as it stood under the bygone limitation statute of 1908. In view of the radical alteration in the law brought about by the Limitation Act of 1963, under which alone the present case falls to be decided, I am satisfied that it is unnecessary to enter into the kind of discussion which had taken up the time and the attention of Courts in the cases cited by learned counsel for the judgment-debtors.

9. Mr. Vanchinathan referred me to a decision in *Nandur Subbayya* v. *Raja Venkataramayya Apppa Rao*[1]. He said that much the same argument as was addressed by the learned Advocate-General in this case was put forward in that case, only to be turned down by Oldfield, J., who gave the leading judgment in that case. It is true that Oldfield, J., rejected the idea that an order for delivery passed by an executing Court on the application of a purchaser in execution sale can itself be regarded as an executable order. But, a perusal of his judgment, especially the concluding paragraph therein, shows that the learned Judge had particularly addressed his mind to the case of a decree-holder-auction-purchaser, rather than that of a third party auction-purchaser. Cases have since held that the position of the two kinds of Court-auction-purchasers is the same in so far as the bar of limitation for an application for delivery is concerned. Oldfield, J., seems to have entertained the idea that the three year period under Article 182 of the

1. (1918) 7 L.W. 16.

old Limitation Act must be sufficient to enable any decree-holder-auction-purchaser to apply for delivery and put into effect the order of delivery, whereas a stranger to the decree or a third party auction-purchaser would be required to obtain delivery of possession within the larger period of 12 years. The learned Judge also seems to have relied principally on the content of Order 21, rule 95, Civil Procedure Code, to hold that an application for delivery being an application in execution cannot at the same time ask for execution of an order in execution. Apart from this last conundrum the entire discussion of the matter by the learned Judge was coloured by the earlier decisions in the law reports, based on the degree of diligence exercised by the auction-purchaser in seeking to obtain delivery of possession of the property. The learned Judge expressed the view that if the dismissal of the earlier application was not due to his fault or to his own laches, then a subsequent application by the auction-purchaser must be regarded as being in continuation of, or as a revivor of, the earlier application. I have shown earlier how all these old-world ideas, which have their origin in the then existing provisions of Article 182 of the Limitation Act, 1908, particulary clause 5 in the third column of the first Schedule, are no longer appropriate under the present law.

10. I may observe also, in passing, that in *Nandur Subbayya* v. *Raja Venkataramayya Appa Rao*[1]. Abdul Rahim, J., had expressed the view that an order for delivery passed by an executing Court in favour of an auction-purchaser marks the end of that application, and what follows the order of delivery is merely the ministerial act of putting that order into effect. The learned Judge would seem to have regarded an order for delivery as itself capable of execution as an executable order. But, he did not pursue this line of reasoning the whole hog, to its logical conclusion, but preferred to decide the case on hand before him on the basis that the subsequent application filed by the auction-purchaser in that case was but a continuation of the earlier application.

11. It may be observed that a subsequent Division Bench of this Court in *Sree Rajah Vadrevu Viswasundara Rao Bahadur* v. *Vannan Paidigadu*[1], preferred to follow the line of the reasoning of Oldfield, J., rather than that of, Abdul Rahim, J. But, I think with respect that the line of reasoning adopted in that case is not appropriate to the entirely different statutory milieu brought about by Articles 134 and 136 of the present Limitation Act, 1963. I am satisfied that on the plain reading and on the clear juxtaposition of Articles 134 and 135 of the schedule to the present Limitation Act, an order for delivery passed by an executing Court in favour of a Court-auction-purchaser is executable as an order within the time prescribed by Article 136 of the schedule to the Act. In the two cases under revision, the decree-holder-purchaser, while filing his subsequent application had asked for an order for delivery, but since the order for delivery had already been made, these applications must, in my view, be dealt with as applications for excuting the order for delivery already passed in their favour. In this view, the applications must be regarded as having been filed within time under Article 136. I accordingly disagree with the view of the court below in C.R.P. No.347 of 1977 that the present application was time-barred. For the same reason in C.R.P. No.709 of 1980. I uphold the decision of the Court below holding that the subsequent application filed by the decree-holder-purchaser for delivery is not time-barred.

12. I am glad to be able to arrive at the conclusion that in both the cases the application for delivery must be held to have been filed within time. It would have been monstrous, if the law were understood to be different driving the auction-purchasers without a remedy in the world for delivery of possession. It is patent that if their applications were to be dismissed as time-barred they would have to resign themselves to a double jeopardy, while the judgment-debtor sits pretty on the property not any the worse either for the decree or for the execution against him. A Court of justice, if it can help it, must avoid a blatant result of this kind. As decree-holders who have obtained leave to bid and set-off and who have purchased the property in Court-auction in execution of their decrees, the moment the sales were confirmed in their

1. (1918) 7 L.W. 16.

1. (1926) 50 M.L.J. 72: 23 L.W. 472; A.I.R. 1926 Mad. 385.

favour, by the same token their decrees also stood, and satisfaction would have been entered then and there. This recording of satisfaction in each case would have become final. If, in such a situation, their applications for delivery were regarded as time-barred then they would not only lose the right to execute their decrees for the simple reason that they had already been satisfied, they would also be losing the right to recover possession of the property which they had purchased in execution of the very decrees and which had been recorded as fully satisfied by the very act of their purchase.

13. It has been held time and again that a decree-holder-purchaser is no better than a third party auction-purchaser. In *Explanation* 2 (*b*) to section 47, Civil Procedure Code, as amended by Amendment Act CIV of 1976, all questions relating to the delivery of possession of such property to a purchaser at a sale in execution of a decree shall be deemed to be questions relating to the execution discharge or satisfaction, of a decree within the meaning of section 47 (1). Section 47 (1) enacts that all questions arising between the parties to the suit relating to the execution discharge or satisfaction of the decree shall be determined by the Court executing the decree, and not by a separate suit. These provisions show that an auction-purchaser, whether he is a decree-holder or not, is inextricably forced to agitate his rights and pursue his remedies only in execution proceedings. A Division Bench of this Court in an unreported decision in *Muthiah Chettiar* v. *Krishnaswami Gounder and others*,[1] while confirming the decision of Mohan, J., had held that an auction-purchaser seeking to obtain delivery of possession of the property purchased by him in an execution sale must seek his remedy for delivery only before the executing Court which held the sale and not by way of a separate suit for recovery of possession. This shows that if an auction-purchaser loses his remedy of delivery on a point of limitation he loses it irretrievably. And where the auction-purchaser is the decreeholder himself, he suffers a double loss as I have earlier observed. That the law relating to limitation, as I have understood it on the basis of my construction of the present Limitation Act of 1963, does not drive the auction-purchaser to this extremity of distinction is another ground which must be in favour of the view I have expressed.

14. In the result, C.R.P. No.347 of 1977 is allowed. The order of Court below in E.A. No. 175 of 1975 is set aside and the Court is directed to deal with the same on merits. C.R.P. No. 709 of 1980 is dismissed and the order passed by the Sub-Court, Thanjavur in E.A. No. 390 of 1979 is confirmed. Having regard to the peculiar circumstances of both these cases, there will be no order as to costs in either of them.

S.J. —— *C.R.P.* No. 347 *of* 1977 *allowed*; *C.R.P. No.* 709 *of* 1980 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Ganesan .. *Petitioner**

v.

Valambal Ammal .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (a) (i) — Petition for eviction — Couple living with their children and grandchildren in husband's house—House belonging to wife let out—Wife's petition for owner's occupation, whether bona fide*—Eviction ordered by Appellate Authority and confirmed by High Court.*

Mr. 'L' and Mrs. 'L' were an elderly couple living with their children and grandchildren in a house belonging to 'L'. A few buildings away in the same street Mrs. 'L' had a house of her own. This house was in the occupation of a tenant. Mrs. 'L' filed an eviction petition against this tenant on the ground that she required the house for her own occupation. The Rent Controller rejected this petition holding that her requirement was not *bona fide*,

On appeal by Mrs. L the Appellate Authority took a different view and held that her

1. L.P.A. No. 19 of 1976.

* C.R.P. No. 715 of 1980. 11th February, 1981.

requirement was *bona fide*. The tenant filed a revision to High Court,

Held, there was nothing unnatural in a wife living in a separate house from the husband and still making the marriage work. The law does not require that there should be some quarrel or misunderstanding of some kind in the family as a ground for personal occupation of one of the spouses away from the residence of the other spouse. [*Paras.* 4 *and* 5.]

Merely saying that the intention behind the the eviction petition is to oust the tenant, and therefore, the intention cannot be *bona fide* is not an argument that can be sensibly raised in proceedings under section 10 (3) (*a*) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. What really has got to be enquired into is whether the landlord's or landlady's requirement is *bona fide*. In judging the issue the fact that possession cannot be obtained without ejecting the tenant in the process can hardly have relevancy on the finding as to *bona fides*. [*Para*. 7.]

Case referred to:—

V. R. Jayaraman v. *N. S. Ramalingam*, (1973) T.L.N.J. 393.

Petition under section 25 (1) and (2) of Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), to revise the decree of the Appellate Authority Principal Sub-Judge, Tiruchirapalli, dated 23rd January, 1980, in C.M.A. No. 74 of 1977 — H.R.C.O.P. No. 405 of 1975, Rent Controller, Tiruchirapalli.

Raj and *Raj*, for Petitioners.

K. Raman and *R. Sitaraman*, for Respondent.

The Court delivered the following

JUDGMENT.— Lakshmanan and his wife Valambal Ammal are an elderly couple. Lakshmanan is aged about 70 years. Valambal Ammal has passed 60 years of age. Lakshmanan has a house in Mariamman Koil Street, Bheema Nagar, Trichinopoly. In that house this old couple are residing for a long time now. Along with them dwell their children and grandchilren. Their first son had unfortunately died at an early age, leaving a widow. The widowed daughter-in-law is also living with them. A few buildings away in the same street Valambal Ammal has a house of her own. The house is in the occupation of a tenant, by name, Ganesan. Valambal Ammal filed a petition before the Rent Controller for evicting this tenant from her house. The principal ground urged in the eviction petition was that she required that house *bona fide* for her own personal occupation as a residence Valambal Ammal had some other house in Trichinopoly town, but they were all occupied by tenants. She particularly wanted the house under the occupation of Ganesan for the purpose of her own residence presumably because it was in the same street in which she was at the time living with her husband.

2. The Rent Controller rejected the plea of Valambal Ammal and held that her requirement was not *bona fide*. He said there was no evidence of misunderstanding between her and her husband or other family members. He further observed that he could not believe that she needed a separate residence for her own when she was actually living with her husband in her husband's house. On this basis, he refused to evict the tenant.

3. On appeal, the Appellate Authority took a different view. The Appellate Authority accepted the evidence of Valambal Ammal to the effect that the accomodation for her and the members of her family in her husband's house was insufficient. On this basis, the Appellate Authority held that her requirement was *bona fide*. An order of eviction accordingly followed.

4. In this revision brought by the tenant, his learned counsel submitted that the finding of the Appellate Authority on the question of *bona fides* is based on a misdirection. Learned counsel submitted that when a wife was living with her husband in her husband's house, her application for her own residence of a house belonging to her cannot be held to be *bona fide* unless the evidence shows that there was a misunderstanding between the spouses or there were other circumstances which had necessitated the wife's living apart from the husband. Learned counsel derived comfort, if not support, from an observation of a Division Bench of this Court in a case briefly reported in *V. R. Jayaraman* v. *N. S. Ramalingam*.[1] The observation

1. (1973) T.L.N.J. 393.

relied upon by the learned counsel had nothing whatever to do with the decision which the Bench had to render in that case. Nevertheless, even though the passage was quite *obiter* in this sense, learned counsel cited the passage as embodying some general principle for observance by Rent Control Authorities. The passage in question was in the following terms—

> "....if it is a residential building, the landlord may not be in a position to get a favourable order under section 10 (3) (*a*) (i) as accommodation for his wife, for, the wife would naturally be living with the husband and there may not be a case for separate accommodation for the wife."

I should not be making the mistake of meeting the dictum in the above passage by drawing any distinction on facts between that case and the present case. That would be to accept that dictum was valid. I do not accept its validity at all. I question its basic assumption. I cannot understand how there is anything in nature, or in the natural course of events, which compels a wife to be living with her husband for the purpose of leading a happy married life. In my view, the matrimonial state does not depend upon an ever present joint living of the spouses in an architecturally integrated structure called a family house or home. Even in the most traditionally built structures, a house may be made up of several portions, such as, the living room, the office room and the drawing room on the one hand, and the kitchen, the puja room, the backyard and other rear portions, on the other. Each part has an individuality all its own. We can hardly visualise a married home in which the wife is living all the time with the husband in the drawing room or the office room, any more than we can visualise the husband living with the wife all the time in the kitchen or in the back court-yard. If the husband and wife can spend the better part of their time in different portions of the same house and yet live together happily in the married state, I do not see how their married life can receive a set-back by the mere circumstances that they begin to live in two separate and different structures, each being an independent residential house. It may be that difficulties can be encountered and suffered and met where quite a distance separates the two spouses and their dwellings. But, there is nothing unnatural in a wife living in a separate house from the husband and still making the marriage work, even as there is nothing unnatural in their living under the same roof and not being able to pull together and make a success of their marriage. In modern times, the exigencies of economic life are such that working women and house wives too, may have to be living separate from their working husbands and may have to be fending for themselves in separate accommodations, sometimes in different cities even. The particular ties of marriage which characterise and condition the proximity of the spouses in their younger days may not have the same adhesion as they both grow old, edging towards their silver or golden weddings. Old people in their roles as parents or grandparents tend to develop emotional attachments which can be quite different from those which once upon a time tied them romantically to the marriage bed. They begin to develop affections for their grandchildren and great-grand children, if not for pet animals. This affiection might often exercise a greater pull than any physical need to spend the time with the other spouse. There might be a hundred and one reasons, all of them valid, as to why a husband or a wife might like to have a separate residence of his or her own, even though they have been living together happily in the same house for a long time. It is, therefore, not realistic to assume as a general observation, much less, as a rule of probability, that the husband and the wife should 'naturally' be living in the same house, and if the one or the other requires another building of his or her own for separate residence, that need should be rejected as unnatural and the urge itself must be dismissed as not *bona fide*. So much for the dicta in *V.R. Jayaraman v. N.S. Ramalingam*[1]. To turn to the present case, there is no evidence whatever on record on the basis of which it could be said that Valambal Ammal's requirement of her house for her residence is not *bono fide*, merely for the reason that she was living with her husband in the hushand's house.

5. The approach of the Rent Controller, as I earlier mentioned, was that there must be some evidence of a quarrel or misunderstanding in order to establish the landlady's *bona fides*. In my view, this is not a proper approach to the inquiry. If it were, then the courts will be paving the way for collusive evidence to be

1. (1973) T.L.N.J. 393.

let in as though quarrels had taken place when in fact there are none. Rigged (*sic*) up evidence would be quite an undesirable tendency for courts to allow. At all events, the law does not require that there should be some quarrel or misunderstanding of some kind in the family as a ground for personal occupation of one of the spouses away from the residence of the other spouse.

6. Learned counsel for the tenant submitted that it is not reasonable to visualise that this lady, who had been married to her husband for a long number of years, would be leaving him to proceed to stay in her own house away from him. This argument assumes that after the lady obtains vacant possession of the house and occupies it, that would mark the end of her marriage and she would part company from the husband. The argument assumes that the husband will not follow her and live with her in the newly secured accommodation in the wife's house. In this case, there is no evidence to show that the preference of the husband would be to live apart from the wife, and not to live with her, if she should repair to her house. On the contrary, quite as naturally as the wife had so far lived with her husband in his house, it is natural to expect that the husband might hereafter live with her in her house.

7. Learned counsel then submitted that the main intention behind the eviction petition was to somehow drive the tenant away, an intention which is underlined by the fact that the petition also canvassed another ground, namely, wilful default, as a ground for eviction. It is true that the intention of the landlady was to see the tenant out of the property. But there is the one and only basis on which one can claim her own occupation of the house. If the house is occupied by the tenant, the landlady cannot occupy it; she cannot occupy it till the tenant vacates and makes way. The driving out of the tenant is a sheer physical necessity and a practical precondition for the landlord's personal occupation. That is also the basis sanctioned by the statute itself. So, merely saying that the intention in the eviction petition is to oust the tenant, and therefore, the intention cannot be *bona fide*, is not an argument at all which can be sensibly raised in proceedings under section 10 (3) (*a*) (*i*) of the Act. What really has got to be enquired into is whether the landlord's or landlady's requirement of the house is *bona fide*. In judging this issue, the fact that possession cannot be obtained without ejecting the tenant in the process can hardly have any relevance on the finding as to *bona fides*.

8. For all the above reasons, I agree with the conclusion of the appellate authority. This petition has to be, and is, accordingly dismissed.

9. Learned counsel for the tenant ultimately put forward a plea for some reasonable time to be granted to his client to enable him to vacate the premises. Hearing a request of this kind is not unusual in cases of this sort, when the tenant knows for certain that he has lost the game. The Act provides for indulgence to be shown to the tenant upto a point. The proviso to section 10 (3) of the Act confers on the Rent Controller a discretion to grant reasonable time to the tenant for putting the landlord in possession of the building. The Rent Controller may also extend the time subject to the ceiling of three months in the aggregate. The statute, however, does not confer discretion of a similar kind in so far as the appellate authority and the revisional Court are concerned. Nevertheless, this Court sitting in revision has always been known to grant further time to the tenants for vacating the premises, where the revision goes against them. This indulgence is extended either with the consent of the landlord or even irrespective of such consent, where this Court considers that time can be granted having regard to all the circumstances of the case. I propose to follow this practice without pausing to consider whether the law allows it.

10. In this case, learned counsel for the landlady reminded me that eviction proceedings had started as early as in the year 1975, and hence further time must be declined. Learned counsel for the tenant, however, pointed out that the landlady is even now, according to present indications, happily living with her husband, not in rented premises, but in her husband's house, and she should not be in any hurry whatever to occupy her own house. I do not however, think I should be examining the considerations urged on either side meticulously for exercising my discretion one way or another. All I can say is that taking note of all relevant factors, it seems to me that four months' time would be reasonable, in the circumstances. There will, accordingly be a direction that the landlady

will not execute the eviction order against the tenant for a period of four months from today. In other respects, the order of the appellate authority will stand confirmed. The civil revision petition is disposed of accordingly. There will however, be no order as to costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

N. Sambasivam .. *Petitioner**

v.

Abdul Sattar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *section* 14 (1) (b)—*Requirement of building by landlord for purpose of demolition and reconstruction*—Bona fides—*Tests.*

Held, under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, the landlord is entitled to evict the tenant from any premises if the same is *bona fide* required by the landlord for the immediate purpose of demolishing it and if such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. In assessing the *bona fides* of the landlord, the means of the landlord to undertake such new construction, the existing condition of the building and the fact that preparation is made by the landlord by way of getting the plan for construction of a new building from the Municipal Authorities, are relevant factors to be considered. But at the same time, if the claim of the landlord in oblique or dishonest made with the sole aim of evicting the tenant, the claim will have to be negatived.

[*Para.* 5.]

Cases referred to:—

Neta Ram v. *Jiwan Lal,* (1962) 2 S.C.R. 625; *Sundaram* v. *A. D. Peter,* (1966) 1 M. L. J. 342; *M. Pattabiraman* v. *The Accommodation Controller,* (1971) 84 L.W. 775; *K. Krishnan* v. *Munusamy,* (1978) 2 M.L.J. 510: I.L.R. (1978) Mad. 193: 91 L.W. 454: A.I.R. 1979 Mad. 50.

Petition under section 25 of Tamil Nadu Act XVIII of 1960 as amended, praying the High Court to revise the order of the III Judge, Court of Small Causes, Madras, dated 25th September, 1978 and made in H.R.A. No. 160 of 1978 (H. R. C. No. 2052 of 1975 VII Judge, Court of Small Couses, Madras).

N. Srivatsa Mani, for Petitioner.

K. Hariharan, for Respondent.

The Court made the following

ORDER.—This civil revision petition is filed by the landlord, the owner of the premises bearing Door No. 11, Gopalapuram, Second Street, Madras-86 against the order of the appellate authority and the Third Judge of Court of Small Causes, Madras in H.R.A. No. 160 of 1978. The landlord originally filed an application in H.R.C. No. 2052 of 1975 on the file of the Court of the Rent Controller and the 7th Judge of Court of Small Causes, Madras seeking to evict the tenant, the respondent herein, on the ground that the tenant had committed wilful default in payment of rent from December, 1974 to June, 1975 and on the ground that the landlord required the premises for the purpose of demolition and reconstruction. The learned Rent Controller after considering the oral and documentary evidence let in the case came to the conclusion that the case of the landlord that the tenant is guilty of wilful default in payment of rent cannot be upheld. The learned Rent Controller also found that the claim of the landlord for eviction on the ground that he required the premises for demolition and reconstruction to be *bona fide* and ordered eviction of the tenant.

2. As against the orders of the Rent Controller evicting the tenant under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act) the tenant filed an appeal to the appellate authority and the Third Judge of the Court of Small Causes, Madras in H.R.A. No. 160 of 1978. The learned appellate authority after examining the orders of the Rent Controller and after going through the evidence in this case came to the conclusion that there is no evidence to show that the

*C.R.P. No. 1052 of 1979.

8th September, 1981.

proved that he has got means to reconstruct the building and that the claim of the landlord under section 14 (1) (*b*) of the Act is not *bona fide* and allowed the appeal of the tenant and dismissed the Rent Control Petition. As against the orders of the appellate authority this civil revision petition has been filed by the landlord questioning the orders of the appellate authority.

3. On behalf of the civil revision petitioner it is contended that the appellate authority had failed to note that the landlord has submitted plan for reconstruction of the premises and that the same had been sanctioned by the authorities concerned and that the appellate authority erred in assuming that the landlord has no means. It is also contended on behalf of the civil revision petitioner that the landlord *bona fide* requires the premises for demolition and for the purpose of putting up an upstair on the premises. In order to appreciate the case of the civil revision petitioner, certain facts will have to be stated.

4. The premises which is the subject-matter of this petition is a small shop used for non-residential purposes forming part of door No. 11, Gopalapuram, Second Street, Madras-86. The said shop was leased out to the tenant, the respondent herein, for the purpose of conducting a tailoring shop. The case of the landlord in the rent control petition is that the petition-mentioned building is old and in a dilapidated condition and that he applied to the Corporation for the sanction of the plan and that he has got ample means to construct a new building instead of the old building. The landlord had also given the necessary statutory undertaking in the Rent Control Petition. He examined himself as P.W. 1 and he filed two plans Exhibit P-1, which is said to be the plan sanctioned and Exhibit P-2 which is said to be the plan for reconstruction. It is also the case of the landlord that as per Exhibit P-2 the Corporation authorities directed the demolition of the shop in the occupation of the tenant and as such the landlord requires the premises for demolition in compliance with the direction of the Corporation authorities and for putting up an upstair as mentioned in the plan. The case of the tenant, the respondent herein, is that the endorsement in Exhibit P-2 that the building licence is given subject to the condition that the shop portion in the occupation of the tenant is to be demolished is a manipulation. The tenant denies building is old and that the landlord had not the case of the landlord that the landlord requires the premises for the purpose of demolition and reconstruction.

5. No doubt under section 16 (1) (*b*) the landlord is entitled to evict the tenant from any premises if the same is *bona fide* required demolishing it and if such demolition is to be by the landlord for the immediate purpose of made for the purpose of erecting a new building on the site of the building sought to be demolished. In assessing the *bona fide* of the landlord, the means of the landlord to undertake such new construction, the existing condition of the building and the fact that preparation is made by the landlord by way of getting the plan for construction of a new building from the municipal authorities, are relevant factors to be considered. But at the same time if the claim of the landlord is oblique or *per se* dishonest made with the sole aim of evicting the tenant, the claim will have to be negatived.

6. In the case reported in *Neta Ram* v. *Jiwan Lal*[1], a case dealing with the Patiala and East Punjab States Union Urban Rent Restriction Ordinance, the Supreme Court observed as follows:—

> "Reading these provisions as a whole, it is obvious that if the landlord's need is genuine and he satisfies the Controller, he can obtain possession of the building or the land, as the case may be. If however, he does not re-erect the building and puts it to any other use or lets it out to another tenant, the former tenant can apply to be put back in possession. Clause (*b*) clearly shows both affirmatively and negatively that the landlord must satisfy the Controller about his claim, before he can obtain an order in his favour. The Controller has to be satisfied about the genuineness of the claim. To reach this conclusion, obviously the Controller must be satisfied about the reality of the claim made by the landlord, and this can only be established by looking at all the surrounding circumstances, such as the condition of the building, its situation, the possibility of its being put to a more profitable use after construc-

1. (1962) 2 S.C.R. 625.

tion, the means of the landlord and so on. It is not enough that the landlord comes forward, and says that he entertains a particular intention, however strongly, said to be entertained by him. The clause speaks not of the *bona fides* of the landlord, but says, on the other hand; that the claim of the landlord that he requires the building for reconstruction and re-erection must be *bona fide*, that is to say, honest in the circumstances. It is impossible, therefore, to hold that the investigation by the Controller should be confined only to the existence of an intention to reconstruct; in the mind of the landlord. This intention must be honestly held in relation to the surrounding circumstances".

In the case reported in *Sundaram* v. *A. D. Peter*[1], Natesan, J., observed as follows:

"It may be pointed out that this Court has recently in more than one case emphasised that it is not always the essential requisite for the application of section 14 (1) (*b*) that the building should be old and decrepit. Old and decrepit state of the building may, in certain cases, be the requirement for demolition. There may be other grounds also for requiring possession of the building for demolition and reconstruction".

In the case reported in *M. Pattabiraman* v. *The Accommodation Controller, Madras and another*[2], Ramaprasada Rao, J., as he then was, quoting with approval of the observations of the earlier decision of this Court observed as follows:—

"The quality and content of the expression *bona fide* appearing in the various sections of the Act and for purposes there enumerated have to be weighed and construed on different lines under different circumstances having regard to the context in which the expression appears. In cases where the claim of the landlord is not *per se* dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that the petitioner is entitled to an order of eviction in the ordinary course, subject of course, to the other conditions prescribed by the Act being satisfied.

. . . .

If therefore, the landlord seeks for release of the building for the immediate purpose of demolishing and reconstructing a building which includes a part of the building then factually he has to verify whether the alteration or the modification sought would amount to demolition. I have already expressed the view that the work to be undertaken by the petitioner is effectively to change the entire phase of the building, its cubic content and its size. More than anything else the roof is sought to be removed and substituted by another of a different variety altogether . . . . *A fortiori*, in a case like the one before me where a material change is being effected in the structure and the identity and contents of the building, the work undertaken by the petitioner as disclosed in the sanctioned plan would certainly amount to demolition and reconstruction of the building".

In the case reported in *K. Krishnan* v. *Munusamy*[1], a Division Bench of this Court observed as follows:—

"A change of the roof of a building will not by itself amount to demolishing a building and putting up a new building on the site of the old building, and to such a case, section 14 (1) (*b*) will not be attracted. The Appellate Authority found that the plan produced by the landlord did not envisage a demolition of the building. On the other hand, it only contemplated a change of the roof of the building. Having adverted to this fact, the Appellate Authority observed that if the landlord violates the Rules of the Corporation and proceeds to made changes deviating from the plan, it is not the concern of the tenant and it would be for the Corporation to take action against that landlord. We are not

1. (1966) 1 M.L.J. 342.
2. (1971) 84 L.W. 775.

1. (1978) 2 M.L.J. 510: (1978) I.L.R. 3 Mad. 193: 91 L.W. 454: A.I.R. 1979 Mad. 50.

concerned with any violation of the Corporation Rules in this case. We are strictly concerned with the requirement of section 14 (1) (*b*) and unless the requirement of the section is satisfied, no landlord will be entitled to ask for eviction under that section. He must establish that he is going to demolish the building and erect a new building on the site. That has not been done in this case. Our revisional powers under section 25 of the Act are wide enough to correct not only illegality but also improprieties. We, therefore, reverse the decision of the Appellate Authority".

Bearing these principles in mind we have to examine the facts of this case to find out whether the claim of the landlord is *bona fide*. The landlord had sent a letter Exhibit R-1 to the tenant claiming an enhanced payment of rent of Rs. 5. The evidence of the tenant is that he refused to pay the enhanced rent and that is the reason whey the landlord has come forward with a false case that he requires the premises for demolition and reconstruction. It is also the evidence of the tenant as R.W. 1 that the landlord had made an attempt to pull down the zinc sheet roofing of the shop and that he had given a criminal complaint to the police. These facts clearly go to show that the relationship between the landlord and the tenant was not smooth at the time of the institution of the proceedings under section 14 (1) (*b*) of the Act.

7. With reference to the construction Exhibits P-1 and P-2 are the two plans filed by the landlord to show that he applied for sanction for the proposed reconstruction from the Corporation. A perusal of both the plans Exhibits P-1 and P-2 will show that the proposed reconstruction is to be undertaken on the up-stair of the premises. Both these plans do not show that any construction is to be made in the place where the petition-mentioned shop stands. Exhibit P-1 is the plan sanctioned by the Madras Metropolitan Development Authority on 30th July, 1977 as per the proceedings of the Madras Metropolitan Development Authority in M.C. No. 1855|n, dated 30th July, 1977. In this plan the proposed up stair portion and the Garage portion to be newly constructed are shown in red colour. The proposed stair-case to be constructed behind the petition-mentioned shop is also shown in red colour. The petition-mentioned premises is shown in yellow colour. No condition was imposed at the time when the plan Exhibit P-1 was sanctioned for construction of stair-case for the up-stair. Exhibit P-1 is described as the plan showing the proposed construction and alteration to the existing building bearing Door No. 11, Gopalapuram, Second Street, 72nd Division, Madras. In another plan filed by the landlord, *viz.*, Exhibit P-2, the proposed additional construction and alterations are the same as that in Exhibit P-1. The order of sanction in Exhibit P-1 is stated to be made on 30th July, 1977, whereas the order of sanction in Exhibit P-2 is stated to be 1st October, 1977, *i.e.*, two months later after the sanction of plan in Exhibit P-1. But in Exhibit P-2 we find a condition that the plan is sanctioned subject to the condition that the shop in front is to be demolished within six months. The landlord as P.W. 1 states that Exhibit P-1 is the sanctioned plan and that Exhibit P-2 is the sanctioned plan for construction of the up-stair portion. No explanation is forthcoming as to why there are two plans for the sanction of the same construction and addition and why no condition is imposed in one plan and a condition that the petition-mentioned shop is to be demolished within six months is imposed in another plan. It is also not the case of the landlord that the presence of the shop infringes any of the building rules. In the absence of proper explanation as to the presence of two plans for the construction and as to why a condition for demolition of the petition-mentioned shop is imposed only in Exhibit P-2, the case of the tenant that the endorsement in the plan that the petition-mentioned shop should be demolished within six months is procured just for the purpose of evicting the tenant will have to be accepted. Though in the application, the landlord states that the building is old and also in dilapidated condition, he had not even spoken a word in his evidence about the condition of the building before the Rent Controller. This is also a circumstances against the *bona fides* of the landlord.

8. It is also in evidence that there are other shops let out for the purpose of Coffee busi-

ness within the same compound and that the landlord had not asked for the eviction of the same for the purpose of reconstruction. The landlord also had not let in evidence to show that he has got sufficient means to undertake the reconstruction of the building. All these circumstances go to show that the claim of the landlord that he requires the premises for demolition and reconstruction is not *bona fide* and the conclusion arrived at by the appellate authority cannot be said to be incorrect.

9. An argument is also advanced on behalf of the tenant that as per the plans Exhibits P-1 and P-2, no construction is proposed to be put up on the site on which the petition-mentioned shop stands and as per section 14 (1) (*b*) of the Act, the tenant is entitled to eviction only if he proposed to erect a new building on the site of the building sought to be demolished and hence the landlord is not entitled to an order of eviction. This question need not be gone into since there are sufficient materials to show that the claim of the landlord is not *bona fide* and on which the claim can be disposed of. There are no merits in the civil revision petition and the same is dismissed. However, there will be no order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

S. Rajan .. *Appellant**

v.

Devi Cine Proprietor, Manufacturing Company by Partner, P. Natarajan at 498, Mint Street, Madras-3

.. *Respondent.*

Transfer of Property Act (IV of 1882), section 106—Lease for a definite term—Notice to quit—Tenant asked to deliver vacant possession by "1st October, 1974" — Whether there is clear 15 days notice—Notice terminating the tenancy, if necessary.

Held, that in this case the tenant was fully aware that the lease period expired on 31st May, 1974. Therefore the question of giving a further notice to vacate, under section 106, Transfer of Property Act, does not arise. Even otherwise in construing the notice one cannot revel in technicalities so as to defeat the very purpose and object of the notice which is given only for the convenience of the parties and to put the parties on guard.

[*Para.* 8.]

Smt. Shanti Devi v. *Amal Kumar,* A.I.R. 1981 S.C. 1550, followed.

Case referred to:—

Smt. Shanti Devi v. *Amal Kumar,* A.I.R. 1981 S.C. 1550.

Appeal against the decree of the City Civil Court (I Additional Judge) Madras in Appeal Suit No. 100 of 1978, preferred against the decree of the City Civil Court (IV Assistant Judge) in Original Suit No. 873 of 1975.

N. Sivamani and *V. Narayanaswami,* for Appellant.

M. Srinivasan and *M. Jayaraman,* for Respondent.

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* S.A. No. 1116 of 1980.

13*th October,* 1981.

The Court delivered the following

JUDGMENT.—The defendant, who suffered a decree for possession in a suit filed by the respondent in O.S. No. 873 of 1975 on the file of IV Assistant Judge, City Civil Court, Madras which decree was confirmed on appeal in A.S. No. 100 of 1978, has come forward with this second appeal.

2. The respondents herein leased out 4-1|2 grounds of vacant land adjoining Agasthya Theatre, belonging to them, comprising premises No. 393|394, Thiruvottiyur High Road in favour of the appellant herein. The lease was for a period of 11 months on a monthly rental of Rs. 360 from 20th August, 1971. One of the terms of the lease was that he should not put up any construction without the express permission of the landlord. The lease was renewed for a period of 11 months from 1st August, 1972, and for another 11 months from 1st July, 1973, and by efflux of time, it expired by 31st May, 1974. By Exhibits A-3 and A-5, the tenant was called upon to vacate; but he did not. Therefore, it became necessary on the part of the plaintiff to file the suit.

3. The appellant, by way of defence, contended *inter alia* that the suit was not maintainable by a single partner and hence it is barred under section 69 (2) of the Indian Partnership Act. The lessee has spent a sum of Rs. 50,000 by levelling the ground, fencing etc. Therefore, he would be entitled to compensation. In any event, there was no valid notice to quit, as contemplated under section 106 of the Transfer of Property Act.

4. The learned trial Judge came to the conclusion that the suit was maintainable and the notice Exhibit A-5, dated 17th August, 1974, was a valid one and complied with the requirements of section 106 of the Transfer of Property Act. On appeal, the findings of the trial Judge were confirmed. Hence, this second appeal.

5. The only point argued by Mr. S. Govind Swaminathan, learned counsel for the appellant before me is, on the terms of Exhibit A-5, dated 17th August, 1974, there cannot be a valid notice. Even though this may be technical, nevertheless if law permits him to raise this contention, it should be held in his favour. According to the learned counsel, since the appellant was called upon to deliver vacant possession of the property "by 1st October, 1974" there is no 15 clear days' notice because the word used is 'by'. In support of his argument, the learned counsel cites an unreported judgment of Ramaprasada Rao, J., as he then was, rendered in *S. Karuppannan* v. *Rangaswami Naidu*[1].

6. In opposition to this argument, Mr. M. Srinivasan, learned counsel for the respondent would submit that in the instant case, the tenancy expired by efflux of time on 31st May, 1974, and thereafter, the question of issuing notice of termination of tenancy does not arise as required under section 106 of the Transfer of Property Act. Even otherwise, Exhibit A-5 merely calls upon the tenant to deliver vacant possession by the first of October, 1974, unlike the ruling cited. In matters of this kind, notice will have to be construed liberally is settled law, because it is after all for the convenience of the parties and to fix the position of the parties, technicalities cannot prevail. Lastly it is submitted that the ruling in C.R.P. No. 1516 of 1972 will have no application and it cannot be good law in view of the recent decisions of the Supreme Court that in a case arising under the Rent Control Act, the provisions of section 106, Transfer of Property Act, would not apply.

7. In the instant case, I would like to refer to Exhibit A-3, which reads as follows:

> "We like to bring to your notice that the period of lease of the 4-1|2 grounds (10-011 sq. ft.) approximately of land leased out to you lying within the premises 393|394, Tiruvottiyur High Road, Madras-81 is expiring by 31st May. 1974.
>
> As per clause No. 6 of the agreement, dated 25th June, 1973, entered into between us, you may vacate and give possession of the ground to us removing all the superstructures and electrical connections if you have put up if any, on or before the expiry date".

8. This is replied by the appellant|defendant under Exhibit A-4 as follows:—

> "Received your letter, dated 27th December, 1973. We are aware that the lease period

1. C.R.P. No. 1516 of 1972, dated 4th April, 1974.

expires on 31st May, 1974...........".

Therefore, it is very clear from the above that the appellant was fully aware that the lease period expired by 31st of May, 1974. Under these circumstances, the question of giving a further notice to vacate, as contemplated under section 106, Transfer of Property Act, does not arise. The decision reported in *Smt. Shanti Devi* v. *Amal Kumar*[1], is a clear authority for this proposition. It has been held:—

> "The lease was a lease for a definite term and, therefore, expired by efflux of time by reason of section 111 (*a*) of the Transfer of Property Act. That being so, the service of a notice under section 106 of the Transfer of Property Act, was not necessary".

Even assuming for the purpose of the case that a notice under section 106, Transfer of Property Act, is necessary, the question is whether it conforms to the requirement of section 106, Transfer of Property Act. What is stated in Exhibit A-5, dated 17th August, 1974, is as follows:

> "We hereby notify you that your tenancy is terminated and require you to vacate and deliver possession of our premises by 1st October, 1974".

According to the learned counsel for the appellant because of the word 'by' which would mean 'on or before 1st October, 1974' and not 'by the mid-night of 30th September, 1974; hence the notice is bad in law. I am unable to agree. It is by the end of the month, namely, the end of September, 1974, the appellant was required to vacate. Therefore, it does conform. In any event, I am of the view that in matters of the kind, one cannot revel in technicalities, so as to defeat the very purpose and the object of a notice, which is given only for the convenience of the parties and to put the parties on guard.

9. The ruling in C.R.P. No. 1516 of 1972 is easily distinguishable, because there the notice was to the effect 'on or before 31st December, 1970'. But here, it is not so. Besides, that ruling was rendered in a case, which arose under the Tamil Nadu Buildings (Lease and Rent Control) Act. Having regard to the recent decisions of the Supreme Court, wherein it has been held that in such a case arising under an Act, such as the Tamil Nadu Buildings (Lease and Rent Control) Act, the special legislation alone will govern, to the exclusion of general legislation. Therefore, this ruling will not be of any assistance to the appellant herein.

10. In the result, I find no hesitation to confirm the concurrent findings of the Courts below. Accordingly, the second appeal will stand dismissed. However, there will be no order as to costs. Time to vacate till 31st January, 1982.

R.S. ——— *Appeal dismissed.*

1. A.I.R. 1981 S.C. 1550.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O. CJ.*

Pushpa Mallick, Proprietor, Tuplex Dry Cleaners .. *Petitioner**

v.

Jammal Mohammed by Power Agent N. P. Sethu Sendadavan .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Rules (1974), *rule* 12 (3)—Ex parte *order of eviction against tenant—Petition to set aside the* ex parte *order—Petitioner residing in the United States of America — No power of attorney given to anyone to conduct the case—Affidavit filed by tenant's brother—Whether in order—No sufficient cause made out to set aside the* ex parte *order.*

Held: Neither a power of attorney nor a written authority has been given to the deponent to the affidavit filed in support of the petition to set aside the *ex parte* order of eviction though the deponent is the brother of the tenant. It is unnecessary to decide in the instant case whether the affidavit filed by him will be in order. No doubt the Court is vested with the power to consider the representation in respect of matters pending before it orally also. The Court in its discretion can decide whether any sufficient cause has been shown for allowing the matter to be decided *ex parte*. To hold that it is only the party affected who can file an affidavit is too

*C.R.P. No. 3299 of 1981. 16*th October,* 1981.

wide a proposition. Nevertheless the *bona fides* of the petitioner herein in prosecuting the case can be judged from the fact that the person who neither holds a power of attorney nor has the written authority has filed an affidavit on behalf of the tenant, who is in the United States. It has been factually made out that no sufficient cause has been given by the tenant to set aside the *ex parte* order and it is clear from the facts that such a petition filed is only to protract the proceedings indefinitely. [*Paras.* 1, 2.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973) praying the High Court to revise the order of the Court of Small Causes (VII Judge), Madras, dated 27th July, 1981 and made in H.R.A. No. 1237 of 1980 (C.M. P. No. 313 of 1980 in H.R.C. No. 934 of 1978) on the file of the Court of Small Causes (IX Judge), Madras.

K. N. Balasubramaniam, for Petitioner.

The Court made the following

ORDER.—The tenant is the petitioner in this Civil Revision Petition. The landlord filed H.R.C. No. 934 of 1978 on the file of the Rent Controller for evicting the petitioner herein on the ground of sub-letting. On 5th August, 1978, the case was posted for final hearing and when it was called on that day, neither the tenant, nor her counsel was present and since there was no representation, an *ex parte* order of eviction was passed on 5th August, 1978. Subsequently, M.P. No. 2111 of 1978 was filed by the tenant for setting aside the *ex parte* order of eviction passed on 5th August, 1978. This petition was allowed on payment of costs of Rs. 100. The house rent control petition was restored to file and the same was posted for final disposal in the special list on 13th September, 1979. On 13th September, 1979, the agent of the landlord was examined in chief as P.W. 1. At the request of the counsel for the tenant, the cross-examination of P.W. 1 was adjourned to 14th September, 1979. But the counsel did not come to the Court though the application was passed over several times and finally it was adjourned till after lunch on 14th September, 1979. Even after lunch on that day, there was no representation either by counsel for the tenant or the tenant herself, which compelled the Court below to pass an *ex parte* order of eviction at 3.30 P.M. on 14th September, 1979. It is to set aside this order of eviction passed *ex parte,* M.P. No. 313 of 1980 was filed. The learned Rent Controller after narrating the abovesaid facts, found that there are no merits in the petition and sufficient cause has not been shown by the tenant to set aside the order of eviction passed *ex parte*. Accordingly, the petition was dismissed. On appeal, the Appellate Authority after carefully going through the facts of the case completely concurred with the finding of the Rent Controller and held that there is no sufficient cause to set aside the *ex parte* order. It also found that the tenant has filed the application for setting aside the *ex parte* order of eviction in order to protract the proceedings, and as such there is no merit in the same. After deciding the case on facts, the appellate authority has also adverted to the affidavit filed by the brother to the tenant. The tenant admittedly was in the United States of America at the time of the hearing of the petition. She has neither given the power of attorney nor any written authority to anyone to conduct the case. In this connection, the Appellate Authority after referring to rule 12 (3) of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974, which is as follows:

> "In any case in which an order is passed *ex parte* against a tenant or a landlord or any order of dismissal for default is passed by the Controller, then the party affected may, within thirty days from the date of the order or if he satisfies the Controller that he knew of the order only on a subsequent date, within thirty days from the date of such knowledge apply to the Controller by whom the *ex parte* order or the order of dismissal was passed, for an order to set it aside, and if he satisfies the Controller that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the application was called on for hearing or that such default was occasioned due to circumstances beyond his control, the Controller shall make an order setting aside the *ex parte* order or the order of dismissal passed, as the case may be, upon such terms as to costs as the Con-

troller thinks fit and shall appoint a day for proceeding with the application,"—

observed that neither power-of-attorney nor written authority has been given to the deponent to the affidavit filed in support of the petition to set aside the *ex parte* order, though the deponent was no other than the brother of the tenant and therefore, he has no legal competency to file an affidavit or maintain the petition for setting aside the *ex parte* order on behalf of the tenant. No doubt the Court is vested with the power to consider the representation in respect of matters pending before it orally also. The Court in its discretion can decide whether any sufficient cause has been shown for allowing the matter to be decided *ex parte*. To construe that it is only the party affected can file an affidavit is too wide a proposition. Nevertheless the *bona fides* of the petitioner herein in genuinely prosecuting the case can be judged from the fact that a person who neither holds a power-of-attorney nor has the written authority has filed an affidavit on behalf of the tenant, who is in the United States of America. The fact that it was only at the request of the counsel for the tenant, the cross-examination of P.W. 1 was adjourned to 14th September, 1981 on which date, the counsel did not appear, and allowed the matter to be decided *ex parte*, coupled with the fact that on the second occasion to set aside the *ex parte* order, an affidavit was filed by the brother of the tenant, which was rightly rejected by the Court below, would go to show that the petitioner herein was interested only in protracting the proceedings. It is unnecessary for me to decide in this civil revision petition as to whether the affidavit filed by the brother of the tenant who has neither power of attorney nor any authorisation to conduct the cause on behalf of the tenant is in order.

2. In view of the discussion made above, it has been factually made out that no sufficient cause has been given by the tenant to set aside the *ex parte* order and it is clear from the facts of the case that such a petition filed is only to protract the proceedings indefinitely.

4. Taking all these facts into consideration, I do not find any error of jurisdiction or any point of law as such involved in this revision for me to admit the same.

4. Consequently, the revision petition is dismissed.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

R. Seshier .. *Petitioner**

v.

T. Ayyachi Ambalam .. *Respondent.*

Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955), *as amended by Act (XIV of* 1956), *section* 3 (4) (b)—*Eviction of tenant sought for failure to pay the fair rent fixed—Tenant's plea of failure of proper yield — Authorised Officer finding* 40% *yield and directing payment of proportionate rent—Jurisdiction of Authorised Officer to order remission of rent.*

A reading of section 3 (4) (*b*) of the Cultivating Tenants' Protection Act, shows that on receipt of an application for eviction the Revenue Divisional Officer shall, after giving reasonable opportunity to the landlord and the cultivating tenant to make their representations, hold a summary enquiry into the matter and pass an order *either allowing the application or dismissing* it; and, in a case falling under clause (*a*) or clause (*aa*) of sub-section (2) in which the tenant has not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable for depositing the arrears of rent payable by him under the Act and on such payment, the tenant shall be deemed to have paid the rent and if he does not pay the rent the Revenue Divisional Officer may order his eviction. There is nowhere any provision in the Act for the Authorised Officer to pass an order reducing the fair rent fixed and directing the cultivating tenant to pay proportionate rate of rent even assuming that the crops were damaged by rain and pests. Therefore the Authorised Officer will not have jurisdiction to grant remission of the rent fixed in other proceedings. [*Para.* 3.]

*C.R.P. No. 3367 of 1978.
28th September, 1981.

Case referred to:—

Ramaswamy Gounder v. *Perianna Moopan*, (1959) 1 M.L.J. 122: (1958) L.W. 843.

Petition under section 6-B of Tamil Nadu Cultivating Tenants' Protection Act, 1955 praying the High Court to revise the Order of the Court of the Authorised Officer (Land Reforms), Madurai, dated 20th June, 1978 and made in T.C.T.P. No. 171 of 1977.

S. Subbiah, for Petitioner.

S. Chidambaranathan, for Respondent.

The Court made the following

ORDER.—This revision is preferred by the landlord, Seshier, against the order in T.C. T.P. No. 171 of 1977 on the file of the Authorised Officer (Land Reforms), Madurai, granting remission of the rent payable by the respondent-tenant, Ayyachi Ambalam, in an application filed by the revision petitioner for eviction of the respondent.

2. The case of the revision petitioner was that the respondent-tenant has not paid the fair rent fixed for the first bogam of Fasli 1387 and therefore he should be evicted. The contention of the respondent was that there was no proper yield due to heavy rains and pest infections and that there was only forty per cent. yield. The learned Authorised Officer on the evidence of P.W. 2, karnam of Sholavandan Village, came to the conclusion that there was only 40 per cent. of the normal yield from out of the lands and ordered payment of proportionate rent. The landlord challenges that order of the Authorised Officer.

3. Mr. Subbiah, learned counsel for the petitioner, contended that the Authorised Officer will have no jurisdiction to grant remission or to order proportionate payment of fair rent in view of the fact that there is no provision in Act XXV of 1955 as amended by Act XIV of 1956. This contention appears to be well-founded. The landlord in this case filed an application under section 3 (4) of the said Act to evict the cultivating tenant as he has not paid the rent for the first bogam of Fasli 1387. A reading of section 3 (4) (*b*) shows that on receipt of an application, the Revenue Divisional Officer shall after giving reasonable opportunity to the landlord and the cultivating tenant to make their representations, shall hold a summary enquiry into the matter and pass an order *either allowing the application or dismissing* it and in a case falling under clause (*a*) or clause (*aa*) of sub-section (2) in which the tenant has not availed of the provisions contained in sub-section (3), the Revenue Divisional Officer may allow the cultivating tenant such time as he considers just and reasonable for depositing the arrears of rent payable by the cultivating tenant under the Act and on such payment, the tenant shall be deemed to have paid the rent and if he does not pay the rent, the Revenue Divisional Officer may pass an order evicting him. It is therefore obvious that the officer acting under this Act has either to allow the application or to dismiss it after hearing the representations of the parties who have been served and in case he finds the tenant is in arrears, he may, in his discretion grant some time for depositing such arrears and if the cultivating tenant does not comply with the order, he may pass an order of eviction. There is nowhere any provision in this Act for the Authorised Officer to pass an order reducing the fair rent fixed and directing the cultivating tenant to pay proportionate rate of rent even assuming that the crops were damaged by rain and pests. It therefore appears to me that the Authorised Officer will not have jurisdiction to grant remission of the rent fixed in other proceedings. It is not disputed and it is also seen from Exhibit B-1 and also from the order of the learned Authorised Officer that fair rent has been fixed in respect of the land of the revision petitioner cultivated by the tenant-respondent. In *Ramaswamy Gounder* v. *Perianna Moopan*[1], Ramachandra Iyer, J., as he then was, took the view that a Revenue Court under the Madras Cultivating Tenants' Protection Act will not have the power to remit the rent due by a tenant on the ground of failure of crop. I am in respectful accord with this view of the learned Judge and as the Authorised Officer has clutched at a jurisdiction not vested in him, this revision has to be allowed and is hereby allowed. The tenant has therefore to pay the full arrears of rent. The result is the order of the Authorised Officer is set aside.

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1. (1959) 1 M.L.J. 122: (1958) L.W. 843.

4. Learned counsel for the petitioner and the respondent now agree that the tenant can deposit Rs. 1,000 in full quit of the amount due for the first bogam of Fasli 1387 within a period of two months from this date and if the tenant does not pay the rent, the landlord may take such action for evicting the tenant. Accordingly, the tenant is granted two months time for deposit of the amount of Rs. 1,000 (Rupees one thousand only) in addition to the sum of Rs. 741 already deposited, into the Court of the Special Deputy Collector, Revenue Court, Tirunelveli, failing which the landlord may take steps to evict the tenant. There will be no order as to costs in this revision.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Doom Doma Tea Company Limited, Calcutta-16 and another .. *Petitioners**

v.

The Union of India owning the North-Frontier Railway, represented by the General Manager, North Frontier Railway, Maligon, Gauhati-II, Assam and others .. *Respondents.*

(A) *Indian Railways Act (IX of* 1890), *section 78-B—Claim against railway — Civil Procedure Code (V of* 1908), *section* 80 — *Suit for recovery of damages by two plaintiffs —Common cause of action—Notice issued by one only — Entire suit cannot be proceeded with—Duty of Court is to reject the plaint—Proper procedure indicated.*

(B) *Civil Procedure Code (V of* 1908), *Order* 1, *rule* 10 (2) *and Order* 7, *rules* 12, 13 — *Defects in notice under section* 80 — *Application to transpose second petitioner as defendant, when can be ordered.*

(C) *Limitation Act (IX of* 1908), *section* 14.

The first plaintiff entrusted 180 cases of tea to the railway to be transported to Coimbatore at railway risk. The second plaintiff was the consignee. There was a mis-despatch of the goods to Kidderpore, Calcutta. On coming to know this, delivery was taken there. There was shortage in delivery and some cases of tea were also damaged. A claim was preferred against the railway under section 78-B of the Railways Act and a notice under section 80, Civil Procedure Code, was given by the first plaintiff. Ultimately a suit was filed for damages for the loss sustained.

Held, Where a claim is made by two plaintiffs and the claim is not severable, the failure on the part of one plaintiff to give a notice under section 80, Civil Procedure Code, would entail the rejection of the plaint as a whole and the plaint cannot be entertained in part with reference to the plaintiff who had given the notice under section 80 of the Code and rejected in part with reference to the other plaintiff who had not issued the notice under section 80. [*Para.* 5.]

In the present case, a reading of paragraphs 4 to 11 of the plaint discloses that the claim for recovery of damages is made on behalf of both the petitioners on a cause of action common to both. The notice issued under section 80, Civil Procedure Code is only on behalf of the first petitioner and there is thus no identity between the person who issued the notice under section 80, Civil Procedure Code and the persons who instituted the suit. Having regard to the nature of the claim made in the plaint on behalf of both the petitioners, it cannot be severed to permit the 1st petitioner alone to proceed with the trial of the suit in the absence of the 2nd petitioner. The result would be that owing to the failure of the second petitioner to issue a notice in accordance with section 80, the entire suit cannot be proceeded with and the duty of the Court in such cases, as pointed out by the Supreme Court, would be to reject the plaint recording an order to that effect with reasons for the order. Under these circumstances, the order of the Court below rejecting the application filed by the petitioners is maintained. The Court below is further directed to pass an order under Order 7, rule 12, Civil Procedure Code, rejecting the plaint in accordance with the provisions of Order 7, rule 13, Civil Procedure Code. The petitioners will be entitled to present a fresh plaint on the same cause of

*C.R.P. No. 1445 of 1981.
10*th August,* 1981.

action. It is needless to point out that in the peculiar circumstances of this case, the petitioners will be entitled to avail, themselves of the benefits of section 14 of the Limitation Act, as the suit instituted in the instant case could not be proceeded with and disposed of, until the statutory conditions laid down had been satisfied or fulfilled as pointed out by the Supreme Court in *India Electric Limited, (In Liquidation)* v. *James Mantosh and another,* (1971) 2 S.C.J. 117: (1971) 2 S.C.R. 397: A.I.R. 1971 S.C. 2313. [*Para*. 5.]

Cases referred to:—

Bhagchand Dagdusa Gujarathi v. *Secretary of State for India,* (1927) 53 M.L.J. 81: A.I.R. 1927 P.C. 176; *Venkata Rangiah Appa Bahadur* v. *Secretary of State,* (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416: 32 L.W. 810: A.I.R. 1931 Mad. 175; *Bachchu Singh* v. *Secretary of State,* (1903) I.L.R. 25 All. 187; *Mahadev Dattatraya* v. *Secretary of State,* A.I.R. 1930 Bom. 367; *Venkata Rangiah Appa Rao Bahadur* v. *Secretary of State,* (1935) 41 L.W. 591: A.I.R. 1935 Mad. 389; *Baghuhana Puri* v. *Jyothy Swarupa,* (1929) I.L.R. 29 All. 325; *Vellayan Chettiar* v. *The Government of the Province of Madras,* L.R. 74 I.A. 223: I.L.R. (1948) Mad. 214: (1947) 2 M.L.J. 208: 60 L.W. 630: A.I.R. 1947 P.C. 197; *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia,* L.R. 76 I.A. 85: (1949) 2 M.L.J. 161: 62 L.W. 444: A.I.R. 1949 P.C. 143; *S. N. Dutt* v. *Union of India,* (1962) 1 M.L.J. (S.C.) 69: (1962) 1 S.C.J. 115: (1962) 1 An.W.R. (S.C.) 69: (1962) 1 S.C.R. 560: A.I.R. 1961 S.C. 1449; *Gangappa Gurupadappa Giggwad* v. *Pachanna,* (1971) 2 S.C.J. 555: A.I.R. 1971 S.C. 442; *India Electric Ltd. (in liquidation)* v. *James Mantosh,* (1971) 2 S.C.J. 117: (1971) 2 S.C.R. 397: A.I.R. 1971 S.C. 2313.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Coimbatore, dated 4th July, 1979 and made in I.A. No. 99 of 1979 in O.S. No. 608 of 1976.

S. R. Ramasubramaniam, of *King* and *Partridge,* for Petitioners.

P. S. Srisailam, for Respondents.

The Court made the following

ORDER.—The plaintiffs in O.S. No. 608 of 1976, Sub-Court, Coimbatore, are the petitioners in this civil revision petition, which is directed against the order of the Court below dismissing an application filed by the petitioners in I.A. No. 99 of 1979 under Order 1, rule 10 (2), Civil Procedure Code, praying to strike out the name of the 2nd petitioner from the array of parties and to allow the 1st petitioner to continue the suit as the sole plaintiff. The circumstances under which the suit in O.S. No. 608 of 1976, Sub-Court, Coimbatore, was instituted by the petitioners may be stated thus: On 7th July, 1973, the 1st petitioner entrusted to the 1st respondent-railway, 160 cases of tea for carriage from Deem Deema Town in Assam to Coimbatore and a railway receipt No. 12|317025 was also obtained by the 1st petitioner from the 1st respondent. The 1st respondent, according to the 1st petitioner, accepted the goods and agreed to carry the same for reward at railway risk and to deliver the goods to the 2nd petitioner at Coimbatore Town. There was a misdespatch of the goods by the railway to Kidderpore Docks in Calcutta within the jurisdiction of the 5th respondent and the consignment was unloaded at Brooklya Siding, Calcutta, where delivery was obtained on coming to know of the same. At the time of effecting delivery, there was a shortage of 48 Kgs., and 4,433 Kgs. were stained by water and in a damaged condition and this was duly noted in the railway delivery book at the time of delivery. Thereafter, according to the petitioners, the damaged goods were sold and a sum of Rs. 21,926.59 was realised and a loss of Rs. 8,043.59 was sustained' which according to the petitioners is recoverable from the respondents. The petitioners stated that by letter, dated 10th December, 1973, they preferred their claim under section 78-B of the Indian Railways Act and also served a notice, dated 12th December, 1973 under section 80, Civil Procedure Code. In response to this, the 7th respondent replied stating that the claim had been referred to the 5th respondent and the 5th respondent took up the stand that the consignment had been duly delivered. In spite of numerous letters, according to the petitioners, the loss sustained by them had not been made good and therefore, the suit was

instituted for the recovery of the sum of Rs. 8,043.59.

2. In the written statement filed on behalf of respondents 5 and 7, the suit claim has been repudiated. In paragraph 6 of the written statement filed by 7th respondent herein, an objection was taken with reference to the validity of the notice under section 78-B of the Indian Railways Act as well as under section 80, Civil Procedure Code.

3. In I.A. No. 99 of 1979, the petitioners filed an application under Order 1, rule 10 (2), Civil Procedure Code, praying that the name of the 2nd petitioner may be struck out from the array of parties on the ground that the 2nd petitioner had been impleaded as a co-plaintiff in its capacity as a consignee, that in view of the objection raised with reference to the defects in the notice under section 80, Civil Procedure Code, an application was filed in I.A. No. 1677 of 1977 to transpose the 2nd petitioner as a defendant which was dismissed and that since the 2nd petitioner had no proprietary title to the goods, it was not a necessary party and its rank as a co-plaintiff in the suit was improper and should therefore be struck off from the array of parties. That application was resisted by the 5th respondent herein and others on the ground that rights have accrued to the respondents which cannot be easily allowed to be wiped out by striking the 2nd petitioner from the array of parties, that the decision in I.A. No. 1677 of 1977 will bar the petitioners from agitating the same matter over again in a different form and that the petition deserves to be dismissed.

4. The learned Second Additional Subordinate Judge, Coimbatore, who enquired into this application found that section 80, Civil Procedure Code, notice in the instant case was issued only by the 1st petitioner and that therefore, the plaint filed suffers from a serious defect. In addition, it was also held that if the 2nd petitioner is struck off from the suit, serious hardship would be caused to the respondents and that having regard to the dismissal of the earlier application for transposition of the 2nd petitioner as a co-defendant, the application lacked *bona fides*. On these conclusions, the petition was dismissed. It is the correctness of this order that is challenged by the petitioners.

5. Before this Court, it is common ground that though the plaint in paragraph 11 proceeded on the footing that section 80, Civil Procedure Code, notice was given on behalf of both the petitioners, it is only the 1st petitioner who issued such a notice and not the 2nd petitioner. The main contention of the learned counsel for the petitioners is that what is sought to be agitated in the suit is not a joint right of petitioners 1 and 2, but the individual right of the first petitioner to claim damages as a consignor and therefore, the 1st petitioner alone can be permitted to proceed with the suit, even though on behalf of the 2nd petitioner no notice under section 80, Civil Procedure Code had been given. On the other hand, the learned counsel appearing for the railways contends that the stand taken by the petitioners in paragraphs 4, 10 and 11 of the plaint proceeds on the footing that the claim is common to both, that section 80, Civil Procedure Code, notice had been issued by both the petitioners and that stand is inconsistent with the stand taken in the affidavit filed in support of an application in I.A. No. 99 of 1979, wherein the 1st petitioner claims to have taken a power of attorney from the 2nd petitioner for lodging the claim and also for issuing a notice under section 80, Civil Procedure Code. It is the further contention of the learned counsel that what is contemplated under section 80, Civil Procedure Code, is an identity of the person who issues the notice with the one who ultimately instituted the suit and that in the instant case, owing to the failure of the 2nd petitioner to issue a notice under section 80, Civil Procedure Code, even the 1st petitioner cannot maintain the suit, though the 1st petitioner might have issued a notice under section 80, Civil Procedure Code, and that under those circumstances, the entire suit is defective and therefore, the 2nd petitioner cannot be struck off from the array of parties. It is no doubt true that the claim in the plaint proceeded on the footing that the 1st petitioner is the consignor, that the 2nd petitioner is the consignee and that both the petitioners had issued notices under section 78-B of the Indian Railways Act and section 80, Civil Procedure Code. But, as stated earlier it is no longer in dispute that the 2nd petitioner did not issue any notice under section 80, Civil Procedure Code. The suit in the present case had been instituted on 4th September, 1976, prior to the coming

into force of the amendments effected by Act CIV of 1976, to the provisions of the Civil Procedure Code, and therefore, the matter has to be dealt with on the provisions of section 80, Civil Procedure Code, as it originally stood. The question that has therefore to be considered is whether the suit as laid can be permitted to be continued by the 1st petitioner alone after striking the name of the 2nd petitioner. It has been pointed out by the Privy Council in *Bhagchand Dagdusa Gujarathi and others* v. *Secretary of State for India*[1], that section 80, Civil Procedure Code, is explicit and mandatory and it admits of no implications or exceptions. But the very question whether a suit brought by two plaintiffs is maintainable when the notice required under section 80, Civil Procedure Code, was given by only one had come up for consideration. In *Venkata Rangiah Appa Rao Bahadur and another* v. *Secretary of State and others*[2], the plaintiffs brought three suits against the Secretary of State for India in Council who figured as the 1st defendant and some other defendants in possession with a view to establish the plaintiffs' right to resume the inam lands and for a declaration that the Secretary of State for India in Council did not have any right to enfranchise these inams and also for recovery of possession ejecting the other defendants therefrom. In that case, the relief was sought for on behalf of both the plaintiffs and the suit was also framed in such a manner as to make it one in which the reliefs mentioned therein were sought for on behalf of both the plaintiffs. The 1st plaintiff alone had issued a notice on 22nd July, 1921, under section 80, Civil Procedure Code, and the question arose whether the suit brought by two plaintiffs is maintainable when the notice required by section 80, Civil Procedure Code, was given by only one plaintiff. The Courts below rejected the plaints under Order 7, rule 11, Civil Procedure Code, on the ground that notice under section 80, Civil Procedure Code, was not given to the Secretary of State for India in Council. Sundaram Chetty, J., after adverting to the decision of the Privy Council in *Bhagchand Dagdusa* v. *Secretary of State*[1], held that the giving of notice about the suit claim by only one plaintiff would not be a strict compliance with the mandatory provisions of section 80, Civil Procedure Code, when the suit is actually filed by two plaintiffs. Observed the learned Judge at page 176 thus:

> "If the requisites of section 80 should be literally complied with, I must say that the giving of notice about the suit claim by one plaintiff would not be a strict compliance with the mandatory provisions of section 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice. There should be identity of the person who issued the notice with the person that brings the suit. In this view, it has been held that a suit brought by a legal representative of a deceased man and a suit brought by a transferee would offend against section 80, Civil Procedure Code, if the notice required by that section was given by the deceased man or by the transferor: vide, *Bachachu Singh* v. *Secretary of State*[2], and *Mahadev Dattatraya* v. *Secretary of State*[3]. As the dictum of the Privy Council indicates that it is no longer left to the discretion of the Court to held in favour of the maintainability of a suit in spite of non-compliance with some of the requisites of the section, I have to find against the maintainability of the present suits on the ground that the notice as required by section 80, Civil Procedure Code, was not given".

Ultimately, the learned Judge relied on the provisions of Order 7, rule 11, Civil Procedure Code, and held that the non-compliance with the requisities of section 80, Civil Procedure Code, can be taken as a ground covered by clause (*d*) of rule 11 and in that view, upheld the order of the Court below rejecting the plaints. On appeal therefrom in *Venkata Rengiah Appa Rao Bahadur and others* v. *Secretary of State and others*[4], a Division

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1. (1927) 53 M.L.J. 81: A.I.R. 1927 P.C. 176.
2. (1930) 59 M.L.J. 923: I.L.R. 54 Mad. 416: 32 L.W. 810: A.I.R. 1931 Mad. 175.

1. (1927) 53 M.L.J. 81: A.I.R. 1927 P.C. 176.
2. (1903) I.L.R. 25 All. 187.
3. A.I.R. 1930 Bom. 367.
4. (1935) 41 L.W. 591: A.I.R. 1935 Mad. 389.

Bench consisting of Beasley CJ., and Cornish, J., affirmed the view taken by Sundaram Chetty, J. Beasley, CJ., after referring to the observations of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State*[1], observed thus:

> "I am of the opinion that the observations to which reference had already been made are applicable to everything and every condition contained in that section and that the section means that, where there are more plaintiffs than one claiming relief, those plaintiffs are required to give the notice provided for in that section. I agree with the view taken by Sundaram Chetty, J., that, there has not been in this case a strict compliance with the mandatory provisions of section 80, Civil Procedure Code, the suit having been filed by two plaintiffs and only one of them having given the statutory notice. That, in my view, disposes of the first argument placed before us.
>
> The second contention put before us is that, although with regard to plaintiff 2 there has been a non-compliance by him with section 80, Civil Procedure Code, in that he has not given the statutory notice, nevertheless plaintiff I who has complied with the requisites of section 80 can proceed with the suit. Sundaram Chetty, J., held that section 80 not having been complied with, plaintiff 1's relief could not be severed from that of plaintiff 2; in other words, the whole suit was bad and that the plaint must be rejected. He relied upon *Baghuhana Puri* v. *Jyothis Swarupa*[2], and upon Order 7, rule 11 (4), Civil Procedure Code, which says that
>
> "the plaint shall be rejected in the following cases .... (*d*) where the suit appears from the statement in the plaint to be barred by any law".
>
> That provision rejects the whole plaint and not any particular part of the plaint. I agree with the view taken by Sundaram, J., upon this part of the case also".

It would thus be apparent that where a claim is made by two plaintiffs and the claim is not severable, the failure on the part of one plaintiff to give a notice under section 80, Civil Procedure Code, would entail the rejection of the plaint as a whole and the plaint cannot be entertained in part with reference to the plaintiff who had given the notice under section 80, Civil Procedure Code, and rejected in part with reference to the other plaintiff who had not issued the notice under section 80, Civil Procedure Code. The same principle has been reiterated by the Privy Council in *Vellayan Chettiar and others* v. *The Government of the Province of Madras and another*[1]. There also the suit was instituted by two plaintiffs Al. Ar. Vellayan Chettiar and Rao Bahadur, D. A. P. R. M. Arunachalam Chettiar against the Government of the Province of Madras and the Municipal Council of Karaikudi praying to set aside the decision of the Appellate Survey Officer with reference to certain lands in Karaikudi village by declaring that the lands belong to the plaintiffs. Only the 1st plaintiff had given notice to the Collector of Madura on 30th June, 1936, to the effect that the decision of the Appellate Survey Officer was erroneous. A defence was raised that the suit notice is not in accordance with law and therefore, the suit is not maintainable. The issues relating to the validity of the notice as well as the waiver thereof were all decided in favour of the plaintiffs by the trial Court, but, on appeal to the High Court that decision was reversed. Upholding the judgment of the High Court, the Privy Council referred to *Bhagchand Dagadusa* v. *Secretary of State*[2], and observed thus:

> "In the present case the question is whether, a notice having been given on behalf of one plaintiff stating his cause of action, his name, description and place of residence and the relief which he claims, a suit can then be instituted by him and another. It is clear to their Lordships that it cannot. The section according to its plain meaning requires that there should be in the language of the High Court of Madras identity of the person who issues the notice

1. (1927) 53 M.L.J. 81: A.I.R. 1927 P.C. 176.
2. (1907) I.L.R. 29 All. 325.

1. (1947) 2 M.L.J. 208: 60 L.W. 630: L.R. 74 I.A. 223: I.L.R. (1948) Mad. 214: A.I.R. 1947 P.C. 197.
2. (1927) 53 M.L.J. 81: A.I.R. 1927 P.C. 176.

with the person who brings the suit. *See Venkata Rangiah Appa Rao* v. *Secretary of State*[1]. To hold otherwise would be to admit an implication or exception for which there is no justification".

Again in *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia and others*[2], the Priviy Council had to consider the competency of a suit laid against the Government by certain plaintiffs, out or whom two had not issued any notice to the Government under section 80, Civil Procedure Code. A contention was raised that as no notice was given on behalf of plaintiffs 2 and 3 in that suit, the suit was not maintainable. Though this was not accepted by the trial Court, the High Court held *contra*. The Privy Council approved of the view taken by the High Court in the following terms:

"The provisions of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. In the present case, it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit. Their Lordships have not been shown any provisions in the Code enabling the trustees to sue in the name of the trust. For these reasons the suit against the Government must be held to be incompetent and the appeal fails".

In *S. N. Dutt* v. *Union of India*[3], the Supreme Court was considering the question whether there would be sufficient compliance with section 80, Civil Procedure Code, when a notice was given by M|s. Dutt and Company and the suit was filed by S. N. Dutt as the sole proprietor of a business carried on under the name and style of S. N. Dutt and Company. It was pointed out by the Supreme Court that such a notice would not be sufficient compliance with section 80, Civil Procedure Code. In doing so, the Supreme Court referred to the decisions of the Privy Council mentioned earlier and pointed out that there must be identity of the person who issues the notice with the person who brings the suit and that in its absence, it cannot be said that section 80, Civil Procedure Code, has been complied with. In *Gangappa Gurupadappa Gugwad* v. *Rachawwa and others*[1], Mitter, J., pointed out the course to be adopted in cases where the plaintiff's cause of action is against a Government and the plaint does not disclose that a notice under section 80, Civil Procedure Code, was served in terms of that section in the following words:

"No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it, if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaint does not show that notice under section 80 of the Code of Civil Procedure, claiming relief was served in terms of the said section, it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of same cause of action".

In the present case, a reading of paragraphs 4 to 11 of the plaint discloses that the claim for recovery of damages is made on behalf of both the petitioners on a cause of action common to both. The notice issued under section 80, Civil Procedure Code, is only on behalf of the first petitioner and there is thus no identity between the person who issued the notice under section 80, Civil Procedure Code, and the persons who instituted the suit This case would, therefore, squarely fall within the ratio of the decision of Sundaram Chetty, J., in *Venkata Rangiah Appa Rao Bahadur and another* v. *Secretary of State and others*[2], approved of by the Division Bench in *Venkata*

1. (1935) 41 L.W. 591: A.I.R. 1935 Mad. 389.
2. (1949) 2 M.L.J. 161: 62 L.W. 44: L.R. 76 I.A. 85: A.I.R. 1949 P.C. 143.
3. (1962) 1 S.C.J. 115: (1962) 1 M.L.J. (S.C.) 69: (1961) 1 An.W.R. (S.C.) 69: (1962) 1 S.C.R. 560: A.I.R. 1961 S.C. 1449.

1. (1971) 2 S.C.J. 555: A.I.R. 1971 S.C. 442.
2. (1930) 59 M.L.J. 923: 32 L.W. 810: I.L.R. 54 Mad. 416: A.I.R. 1931 Mad. 175.

Rangiah Appa Rao Bahadur and others v. *Secretary of State and others*[1], and the Supreme Court in *Gangappa Gurupadappa Gukwad* v. *Rachawwa and others*[2]. Having regard to the nature of the claim made in the plaint on behalf of both the petitioners, it cannot be severed to permit the 1st petitioner alone to proceed with the trial of the suit in the absence of the 2nd petitioner. The result would be that owing to the failure of the second petitioner to issue a notice in accordance with section 80, Civil Procedure Code, the entire suit cannot be proceeded with and the duty of the Court in such cases, as pointed out by the Supreme Court, would be to reject the plaint recording an order to that effect with reasons for the order. Under these circumstances, the order of the Court below rejecting the application filed by the petitioners is maintained. The Court below is further directed to pass an order under Order 7, rule 12, Civil Procedure Code, rejecting the plaint in accordance with the provisions of Order 7, rule 13, Civil Procedure Code. The petitioners will be entitled to present a fresh plaint on the same cause of action. It is needless to point out that in the peculiar circumstances of this case, the petitioners will be entitled to avail themselves of the benefits of section 14 of the Limitation Act, as the suit instituted in the instant case could not be proceeded with and disposed of, until the statutory conditions laid down had been satisfied or fulfilled as pointed out by the Supreme Court in *India Electric Limited, (in liquidation)* v. *James Mantosh and another*[3]. The civil revision petition is, therefore, dismissed; but there will be no order as to costs.

R.S. —— *Petition dismissed.*

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1. (1933) 41 L.W. 591: A.I.R. 1935 Mad. 369.
2. (1971) 2 S.C.J. 555: A.I.R. 1971 S.C. 442.
3. (1971) 2 S.C.J. 117: (1971) 2 S.C.R. 397: A.I.R. 1971 S.C. 2313.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O. CJ. and P. Venugopal, J.*

M. Manirajan .. *Appellant**

v.

The Assistant Commissioner of Police, Mylapore Range, Madras-4 and others .. *Respondents.*

Madras City Police Act (III of 1888), *section* 36—*Lodging House — Licence for running—Lodging house run in rental premises, after obtaining requisite licence from Police — Premises sold to another—Rent paid to the new owner accepted—New landlord not giving consent for continuance of the lodging house —Application for renewal of licence rejected—Appeal to appellate authorities also rejected—Writ petition also rejected—On writ appeal tenant held to be statutory tenant—Direction issued to Commissioner of Police to consider application in accordance with law.*

M was running a lodging house in a rented premises in Mylapore, Madras. He had obtained the consent of the landlord for running a lodging house and had also obtained a licence under the Madras City Police Act. Subsequently, the landlord sold the premises to another. *M* attorned tenancy to the new landlord and was paying rent to the new landlord. However, the new landlord did not agree for the continued running of the lodging house. When *M* applied for renewal of the licence under the Madras City Police Act, this was rejected on the ground that the present landlord had objected to the running of a lodging house in the premises. Against this, *M* filed an appeal to the 2nd respondent herein who dismissed the appeal. Thereafter *M* filed a revision to the Commissioner of Police, who also dismissed the revision. This order was challenged in a writ petition. The learned single Judge of the High Court dismissed the

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*W.A. No. 756 of 1980.

9th November, 1981.

petition at the stage of the admission itself. Against this *M* filed an appeal.

Held, inasmuch as the appellant is a statutory tenant protected under the Tamil Nadu Buildings (Lease and Rent Control) Act, he continues to be a tenant until evicted as per the provisions of the said Act. The refusal to grant renewal of the licence is not based on relevant factors and as such the matter has to be remanded to the file of the Commissioner of Police, City of Madras, the third respondent herein, for the purpose of disposal afresh. [*Para.* 5.]

Appeal under clause 15 of the Letters Patent against the order of Mr. Justice Mohan, dated 26th November, 1980 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6476 of 1980, presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the third respondent in R.C. No. 246|27154|E5|80 and to quash the order therein dated 8th October, 1980.

V. Sridevan, for Appellant.

The Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Gokulakrishnan, O. CJ.—The appellant herein filed the writ petition making the Assistant Commissioner of Police, Mylapore Range, the Deputy Commissioner of Police, Law and Order (South) Madras and the Commissioner of Police, Egmore as party respondents, for the issue of a writ of *certiorari* calling for the records of the third respondent in R.C. No. 246|27154|E5|80 and to quash the order dated 8th October, 1980. The appellant is running a lodging house at the premises bearing D. No. 27, North Mada Street, Mylapore, Madras-4. The said property originally belonged to M|s. R. V. Surendra Rao and R. V. Subba Rao and it is with them the appellant became a tenant and with their consent he obtained licence No. 253-E for running a lodging house under the Madras City Police Act of 1888. After obtaining proper licence, the appellant was running a hotel under the name and style of 'Suprabath Lodging'. Necessary Corporation licence has also been obtained by the appellant. One B. S. Kumar and B. S. Rajendran purchased the premises No. 27, North Mada Street, Mylapore in November, 1979. The appellant has attorned his tenancy to them and is also paying a monthly rent of Rs. 1,600 without any default as and from 1st December, 1979. The Assistant Commissioner of Police by his order, dated 18th June, 1980, stated that the owners of the premises, *i.e.,* B. S. Kumar and B. S. Rajendran, have objected to the renewal of the lodging house licence for the year 1980-81, that the previous lease entered into by the appellant, had expired on 31st March, 1979, and that the appellant had no valid lease agreement either from the previous owner or from the present owners permitting him to run the lodging house as and from 31st March, 1979. The appellant was earlier directed to show cause why the licence issued to him should not be cancelled. After getting a reply and also after referring to the report of the Assistant Health Officer to the effect that the sanitary conditions of the lodge were not satisfactory the Assistant Commissioner rejected the renewal application by cancelling the licence No. 253|E issued to the appellant herein. In passing the said order, the Assistant Commissioner purported to exercise his power under section 36 of the Madras City Police Act. Thus it is clear that the licence granted in favour of the appellant was cancelled, (which we presume is only refusal to renew the licence applied for by the appellant), on the ground that the owners of the building had refused to give their consent for renewal and that the report of the Assistant Health Officer is to the effect that the sanitary conditions of the lodge were not satisfactory. Against this order of refusal to renew the licence the appellant preferred an appeal to the second respondent herein. The second respondent, namely the Deputy Commissioner of Police, Law and Order, South Madras, finding that the owners of the building are not agreeable for renewing the licence, observed that such a state of affairs when there is disharmony between the owners and the tenant as a lodge-keeper is bound to give rise to law and order situations and affect the decency and public safety and ultimately held that as per sub-order (8) of Standing Order 63, the appellant must produce a consent letter from the owners and since no con-

sent letter has been given, the licence cannot be renewed. With these observations, the appeal was dismissed. Against this order, the appellant preferred a revision to the Commissioner of Police whose order is impugned in the writ proceedings. The Commissioner of Police, after accepting the finding of the Deputy Commissioner of Police to the effect that there is likelihood of law and order problem arising due to ill-feelings between the landlords and the tenant and also observing that the Assistant Health Officer of the Corporation of Madras in his reference C. No. A1|205|80, dated 18th April, 1980, had reported that the sanitary conditions of the Lodge were not satisfactory, dismissed the revision petition. It is against this order of the Commissioner of Police, the writ petition has been filed. The learned single Judge of our High Court, at the admission stage itself after observing that the writ Court cannot sit in judgment over the reasons given by the police authorities to the effect that law and order problem would be created and that there is also a report of the Assistant Health Officer of the Corporation of Madras regarding the sanitary conditions of the Lodge, dismissed the writ petition. It is against this order of dismissal of the writ petition, the present writ appeal has been filed.

3. Mr. Sridevan, the learned counsel appearing for the appellant correctly points out that Standing Order 63 (8) will not apply to the facts of this case. The said Standing Order 63 (8) is as follows:—

> "When the possession or ownership of the tea shop etc., is transferred, the transferee shall apply within fifteen days from the date of such transfer along with the Corporation licence duly transferred in his name and also a letter of consent of the seller and the owner of the premises where the tea shop etc., is run".

3. This is not a case wherein any transfer of tea shop etc., is being made. This is a case in which the appellant wants renewal of the licence for running the lodging house which he was having previously. We are convinced that this Standing Order will not apply to the facts of this case.

4. Mr. Sridevan has also correctly pointed out as to how the report of the Assistant Health Officer referred to by the Deputy Commissioner of Police cannot stand for a moment's scrutiny. Section 103 (1) (*a*) of the Tamil Nadu Public Health Act, 1939, which deals with the registration and renewal of registration clearly states that the executive authority shall not register an applicant until the Health Officer has inspected the premises named in the application and has recommended such registration. As far as the present case is concerned, there is a registration certificate issued under section 101 of the Tamil Nadu Public Health Act, 1939, dated 20th June, 1980, by the Corporation of Madras. This is definitely subsequent to the report of the Assistant Health Officer dated 18th April, 1980 which is referred to in the order of the Deputy Commissioner who is the second respondent herein. As we have already stated, the registration certificate shall be issued under section 103 of the Tamil Nadu Public Health Act only after the Health Officer has inspected the premises named in the application and has recommended the application. The very fact the certificate of registration was issued on 20th June, 1980, establishes that subsequent to the inspection on 3rd April, 1980, there ought to have been another inspection by the Health Department of the Corporation and on the strength of such inspection report, the certificate, dated 20th June, 1980 ought to have been issued. This fact has been overlooked in the orders passed by the second and third respondents herein.

5. As regards the consent from the present owners of the premises, Mr. Sridevan submitted that after the lease period was over with his previous landlords, the appellant becomes a statutory tenant and as a matter of fact the present landlords have also received rents from the appellant subsequent to the purchase of the premises by them. The contention of the appellant is that the apprehension of the second and the third respondents as if a law and order problem will be there is very vague and this problem is visualised on the ground that the owner of the premises has not given his consent for renewal of the licence. Inasmuch as the appellant is a statutory tenant protected under the Tamil Nadu Buildings (Lease and Rent Control) Act, he continues to be a tenant until evicted as per the provisions of the said Act. To say that a law and order problem will be created merely because the owner of

the building has not given consent, in our opinion, is very vague and that cannot be a ground for refusing the renewal asked for. The learned Government Pleader appearing for the respondents is not able to effectively counter this argument. We are of the view that the refusal to grant renewal of the licence is not based on relevant factors and as such the matter has to be remanded to the file of the Commissioner of Police, City of Madras, the third respondent, herein, for the purpose of disposal afresh.

6. In these circumstances, the writ appeal is allowed with a direction that the matter will be remanded to the file of the third respondent herein for the purpose of disposal afresh in accordance with law and in the light of the observations made above. The third respondent is directed to dispose of the matter on remand within a month from this date. There will be no order as to costs.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

Bharat Trading Company, a partnership firm through one of its Partners K. Palanimalayan and another .. *Petitioners**

v.

K. Shanmughasundaram .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *as amended by Act (XXIII of* 1973), *section* 14 (1) (b) *—Scope and applicability—Petition for eviction of tenant—*Bona fide *requiring building for demolition—Meaning.*

The Madras Buildings (Lease and Rent Control) Act is in essence expropriatory in character involving serious curtailment of the rights of owners of properties and Courts should not give any undue or wide interpretation to a provision beyond what the express language of the provision warrants in consonance with the avowed object of the legislation, namely, prevention of unreasonable eviction of tenants.

There is nothing in the object of the enactment or in the language of section 14 (1) (*b*), which compels or necessarily warrants the view that once a building is let out, the landlord can never obtain possession of the property either for better investment or for improvement, in the sense that the tenant acquires a permanent right, as it were, subject only to the dilapidated condition of the building. The condition of the building is obviously an objective test to be established by evidence and capable of verification by personal local inspection. If the crux of the question centres round the physical state or condition of the building, there will be very little scope for the notion of *bona fide* requirement. There is no warrant for reading the words 'building *bona fide* required by the landlord' in section 14 (1) (*b*) as equivalent to "building *bona fide* requiring demolition". But it is not possible to have occupation of a building *bona fide* requiring demolition. A decrepit building no doubt may call for immediate demolition and without anything more the landlord could be said to have satisfied the requirement or condition of his *bona fide* requiring the building for immediate demolition. But the terms of the section are wide enough to cover cases where the landlord *bona fide* requires a building for the expansion of his own business or for legitimate purposes. A concrete and immediate proposal or scheme to demolish an existing building and reconstruct it into a bigger, more productive and higher income-yielding one, cannot by any means be said to be *mala fide*. The proper view to take of section 14 (1) (*b*) would be that whenever the condition of the building is not such as to require immediate demolition the case of the landlord should be scrutinised to find out whether he *bona fide* intends to immediately demolish the building or whether the provision is invoked merely with a view to evict the tenant. In that context the plans or schemes of the landlord his resources, his getting sanction from the Municipal Authorities for the reconstruction, etc., would have a bearing as tending to establish the *bona fide* requirement of the landlord. Section 14 (1) (*b*) is not rendered inapplicable merely because the building is not old or dilapidated but is in a good condition. In other words,

*C.R.P. No. 1892 of 1979.
8th September, 1981.

if the intention of the landlord for demolition and reconstruction is proved to be genuine and not spurious or specious, he will be entitled to obtain an order for eviction under section 14 (1) (*b*) whether or not the condition of the building is such as to require immediate demolition, the age and dilapidated condition of the building not being a *sine qua non* for such eviction. [*Para.* 5.]

In this case there is a clear finding by the Courts below that the building is an old one and from the evidence it is clear that it had cracks on the floor and on the walls and the wooden frames are partially eaten away and have become hollow in certain places. The Courts below have also assessed the age of the building as 50 to 55 years. The fact that the building got partially damaged due to a fire accident in the adjacent building was also taken into consideration by the Courts below. On these facts, there is a definite finding that the building is an old one and it requires demolition and reconstruction. The conclusion that the building requires demolition and reconstruction is justified.) [*Para.* 7.]

Cases referred to:—

Metalware & Co. v. *Bansilal Sarma,* (1979) 3 S.C.C. 398: (1980) 1 M.L.J. (S. C.) 1: (1979) 2 S.C.J. 377: A.I.R. 1979 S. C. 1559; *Neta Ram* v. *Jiwan Lal,* (1962) 2 S.C.J. 270: (1962) 2 S.C.R. (Supp.) 623: A.I.R. 1963 S.C. 499; *K. Ramachandra Rao* v. *Krishnaswami Iyengar,* (1976) 1 M. L.J. 267: 89 L.W. 127; *M. P. David* v. *N. Daniel,* (1967) 1 M.L.J. 110; *Mahboob Badsha* v. *M. Manga Devi,* (1965) 2 M.L.J. 209; *Panshamal Narayan Shenoy* v. *Basthi Venkatesha Shenoy,* (1970) 2 S.C.J. 601: (1970) 3 S.C.R. 734: A.I.R. 1971 S.C. 942; *Pappu Ammal* v. *M/s. Lal Chemicals & P. S. Palani Chetty,* I.L.R. (1978) 2 Mad. 321: (1978) 1 M.L.J. 523: 91 L.W. 219: A.I.R. 1978 Mad. 272; *M/s. K. P. Lonappan & Sons* v. *S. Mohamed Iqbal,* (1981) 94 L.W. 282.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as amended by Act XXIII of 1973, praying the High Court to revise the Order of the Court of the Subordinate Judge, Madurai, dated 4th July, 1979 in C.M.A. No. 200 of 1978 against (R.C.O.P. No. 373 of 1976 on the file of the Court of the I Additional District Munsif, Madurai Town).

G. John Arthur, Daniel Devasahayan and *A. Jinasenan,* for Petitioner.

T. R. Mani and *S. Chandramouli,* for Respondent.

The Court delivered the following

JUDGMENT.—The Civil Revision Petition is filed by the Bharat Trading Company through one of its Partners K. Palanimalayan, to evict the tenants in respect of the petition mentioned premises hearing Door Nos. 40 and 40-A, North Veli Street, Madurai in which they are conducting a business in automobile spare parts. Originally the landlord, the respondent herein, filed an application in R.C.O.P. No. 373 of 1976 on the file of the Court of the Rent Controller and the District Munsif, Madurai Town for the eviction of the tenants on the ground that the landlord required the premises for demolition and reconstruction under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, hereinafter referred to as the Act. The case of the landlord before the Rent Controller is that the petition-mentioned building is old and that he intended to demolish the old construction and proposed to erect a new building. The building is situate in an important locality. He requires the building *bona fide* for the purpose of demolition and reconstruction and he has also given the necessary statutory undertaking regarding the demolition as per the provisions laid down in the Act. On the other hand the tenants contended before the Rent Controller that the premises is a pucca building and there is no need to demolish the same because the condition of the building is good. The tenants paid an advance of Rs. 2,330 to the vendor of the landlord and the same will have to be credited to the account of the tenants. It is also the case of the tenants that from the inception of the building they have maintained the same at their cost and that in 1952 they put up two rooms in the upstairs to the knowledge of the predecessor-in-title of the landlord measuring 23¾' × 10¾' and that construction is a terraced one and that the latrine which was in the backyard has been shifted to the third room of the building at an expense of Rs. 1,845. It is also the case of the tenants that these constructions were made with the permission of the erstwhile landlord. The plea of the tenants is that after the purchase of the peti-

tion-mentioned building by the present landlord he demanded a higher rent and on the refusal of the tenant to pay such higher rent, the landlord filed the rent control petition to evict the tenants somehow. The learned Rent Controller after examining the oral and documentary evidence let in this case came to the conclusion that the landlord had not established that the premises is old and dilapidated and that the claim of the landlord for eviction on the ground of demolition and reconstruction is not *bona fide* and dismissed the rent control petition. As against the orders of the Rent Controller the landlord filed an appeal in C.M.A. No. 200 of 1978 on the file of the appellate authority and the Principal Subordinate Judge, Madurai and the appellate authority came to the conclusion that there is sufficient evidence to show that the building is old. The learned appellate authority observed that even if the building is not old as observed by the Rent Controller, from the said facts alone, it cannot be concluded that the requirement of the building for demolition and reconstruction is not *bona fide* since the landlord had proved his means to undertake such reconstruction. The learned appellate authority also observed that the motive of the landlord is quite immaterial if the landlord required the building for the immediate purpose of demolition and reconstruction. The appellate Court also held that in view of the undertaking given by the landlord under section 14 (1) (*b*) of the Act, if the landlord fails to demolish the building within the prescribed time the tenants can seek the recovery of possession under section 16 of Act and allowed the appeal and ordered the eviction of the tenants under section 14 (1) (*b*) of the Act. As against the said order of the appellate authority this civil revision petition has been filed by the tenants.

2. The main contention urged on behalf of the tenants in this civil revision petition is that the building is in a sound condition and the soundness of the building has been vouchsafed by a qualified Engineer who has given a certificate, Exhibit B-1, and who was examined as R.W. 1 before the Rent Controller and that the claim of the landlord that he requires the premises for the purpose of demolition and reconstruction is not *bona fide*. The case of the landlord before the Rent Controller is that the building was constructed prior to 1919 and hence the building is nearly more than 50 years old. As against this the evidence on behalf of the tenant is that the age of the building is not known. In the absence of evidence to the contrary the evidence let in on behalf of the landlord that the building is more than 50 years old, will have to be accepted.

3. The second contention urged on behalf of the tenants is based upon the document Exhibit A-7, filed by the landlord, to show that the building was in existence even as early as in the year 1919. Exhibit A-7 is a document in favour of the predecessor in title of the landlord in respect of the petition-mentioned premises. It is pointed out by the learned Advocate for the civil revision petitioners that in the document Exhibit A-7, the entire structure of the building is a tiled one but the building at present is of terraced roofing and this discrepancy in the description of the property itself shows that the building must have been reconstructed subsequent to 1919 and therefore the condition of the building does not warrant the demolition and reconstruction. There is no evidence to show as to when the roofs were converted from tiled roofs into terraced roofs. In the absence of positive evidence in this regard it is not possible to accept the above contention on behalf of the civil revision petitioners, and in respect of a claim under section 14 (1) (*b*) we are more concerned with the existing condition of the building.

4. The third contention on behalf of the civil revision petitioners is based upon the Supreme Court decision reported in *Metalware & Co., etc.* v. *Bansilal Sarma and others*[1], to the effect that the existing condition of the building is a vital factor in considering the *bona fide* requirement of the landlord for the purpose of demolition and reconstruction. Reliance is placed on behalf of the civil revision petitioner in the case reported in *Neta Ram* v. *Jiwan Lal*[2], where the Supreme Court observed as follows:—

"It is impossible therefore to hold that the investigation by the Controller should be

1. (1979) 3 S.C.C. 398: (1980) 1 M.L.J. (S.C.) 1: (1979) 2 S.C.J. 377: A.I.R. 1979 S.C. 1559.

2. (1962) 2 S.C.R. (Supp.) 623: (1962) 2 S.C.J. 270: A.I.R. 1963 S.C. 499.

confined only to the existence of an intention to reconstruct in the mind of the landlord. This intention must be honestly held in relation to the surrounding circumstances. The very purpose of the Restriction Act would be defeated, if the landlords were to come forward and to get tenants turned out, on the bare plea that they want o reconstruct the houses, without first establishing, that the plea is *bona fide* with regard to all circumstances, *viz.*, that the houses need reconstruction or that they have the means to reconstruct them."

In considering whether the claim of the landlord for the purpose of demolition and reconstruction is *bona fide* we will have to see whether the conclusion arrived at by the appellate authority that the claim of the landlord is *bona fide* is based upon a correct appreciation of the evidence in this case. Admittedly the building is more than 50 years old and the tenancy itself is 30 years old and it is the case of R.S. 2, that the tenants had put up certain rooms in the first floor even in the year 1951. Hence the fact that the building is an old one cannot be disputed. The tenants engaged an Engineer by name one S. Ramanathan, to report about the condition of the building and he gave the resport which is marked as Exhibit B-1 and he was examined as R.W. 1. Exhibit B-1 is in the form of a questionnaire and apart from stating that the building is structurally sound no other details relevant for consideration are given in Exhibit B-1. R. W. 1 in his evidence also admits that he inspected the building at the instance of the son of the occupier of the building, who is also an Engineer and who wanted a stability certificate regarding the building. It is also the evidence of R.W. 1, that the purpose for which the stability certificate was required was not disclosed by the son of the occupier of the building. R.W. 1 also admits that in the certificate given by him *viz.*, Exhibit B-1, he had not noted the condition of the wood, rafters, doors, windows and beams. He also admits that the building must have been constructed in portions and that the oldest portion of the building might have been constructed about 60 to 70 years back. According to him the portions marked as A to H in the Commissioner's plan constitute the oldest portions. The portions marked as A to H in the Commissioner's plan, *viz.*, Exhibit C-2, constitute the main portions of the building. Thus even from the evidence of the Engineer as R.W. 1, it is seen that the case of the landlord that the building is an old one is made out. In a case of a claim under section 14 (1) (*b*) of the Act it is not necessary for the landlord to establish that the building is in such a condition that it will crumble down in the near future. The landlord is entitled to demolish even a building which is not likely crumble down in the near future provided that he had a *bona fide* intention of demolishing the building and construct a new building in that place. The condition of the building is relevant only for ascertaining the *bona fides* of the landlord in the sense that no landlord will demolish a building which is in good condition unless for a better return from the same. Only in this view we will have to examine the condition of the building and see whether the condition of the building in such that no landlord will embark upon the project of demolition and reconstruction. In this case as already stated the building is more than 50 years old. The main portion of the building is more than 60 years old and it is in evidence that the tenants are in occupation of the building for more than 50 years. A Commissioner was appointed at the instance of the tenants to inspect the building his report about the condition of the building is marked as Exhibit C-1 and the plan submitted by him is marked as Exhibit C-2. The Commissioner has noted several features which show that the building is an old one. The Commissioner has found in the main hall marked as 'I' in the plan Exhibit C-2 all the 15 rafters are replaced and the ceiling is newly plastered and that there is a crack running continuously east to west in the ceiling, which has been plastered with cement. The Commissioner found that the plastering in several places had given away. The rafters in several portions of the building are found to be moth-eaten. According to the Commissioner the condition of the building cannot be said to be strong, and appears to be an old building and the plastering of the walls are not in a good condition and the rafters are moth-eaten. No objection seems to have been filed by the tenants to the Commissioner's report. The report also had been allowed to be marked without calling the Commissioner for cross-examination. From the report of the Commissioner it cannot be

said that the building is in such a sound condition in respect of which the demolition and reconstruction is not needed.

5. My attention is drawn to the decision of a single Judge of this Court reported in *K. Ramachandra Rao* v. *Krishnaswami Iyengar and others*[1], referred to by the learned Rent Controller, where it has been held that it is not possible to hold that the requirement of a landlord who has no doubt the means and has obtained the necessary licence from the concerned authorities is *bona fide,* where his case in the petition for eviction is that the building in old and in a dilapidated condition and that he therefore requires it for purposes of immediate demolition and reconstruction and that allegation has not been substantiated but has been found to be otherwise in that the building has been found to be in a sound contion although it is about 50 years old. But in this case from the Commissioner's report it is seen that the condition of the building is not sound and hence the observation in the above case cannot be said to apply to the facts of this case. In a Division Bench decision of this Court reported in *H. P. David and another* v. *N. Daniel and others*[2], it has been observed that the only requirement of section 14 (1) (*b*) is the honest desire of the landlord to demolish the building and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. There is nothing in the language of this clause to warrant the view that the building should be old and decrepit. The expression '*bona fide*' occurring in that clause cannot sustain the opinion that it is only when a building is old and in a dilapidated condition that it could be demolished for the purpose of putting up a new construction so as to attract clause (*b*) of section 14 (*i*). The impact of the section is that the desire on the intention to demolish and rebuild should be honestly entertained by the landlord. It should not be a device to evict the tenant. In the case reported in *Mahboob Badsha* v. *M. Manga Devi and another*[3], a single Judge of this Court observed that there is nothing in the language of section 14 (1) (*b*) to warrant the interpretation that the words '*bona fide* required by the landlord' is referable only to the condition of the building ruling out every other consideration. It must not be forgotten that the Madras Buildings (Lease and Rent Control) Act is in essence expropriatory in character involving serious curtailment of the rights of owners of properties and therefore Courts should not give any undue or wide interpretation to the provision beyond what the express language of the provision warrants, in consonance with the avowed object of the legislation, namely, unreasonable eviction of tenants. There is nothing in the object of the enactment or in the language of section 14 (1) (*b*), which compels or necessarily warrants the view that once a building is let out, the landlord can never obtain possession of the property either for better investment or for improvement in the sense that the tenant acquires a permanent right, as it were, subject only to the dilapidated condition of the building. The condition of the building is obviously an objective test to be established by evidence and capable of verification by personal local inspection. If the crux of the question centres round the physical state or condition of the building, there will be very little scope for the notion of a *bona fide* requirement. There is no warrant for reading the words: '*bona fide* required by the landlord' in section 14 (1) (*b*) as equivalent to "building *bona fide* requiring demolition". Either the building requires demolition or it does not. But it is not possible to have an occupation of a building *bona fide* requiring demolition. A decrepit building no doubt may call for immediate demolition and without anything more the landlord could be said to have satisfied the requirement or condition of his *bona fide* requiring the building for immediate demolition. But the terms of the section are clearly wide enough to cover cases where the landlord *bona fide* requires a building for the expansion of his own business or for legitimate purposes. A concrete and immediate proposal or scheme to demolish an existing building and reconstruct it into a bigger, more productive and higher income-yielding one cannot by any means be said to be *mala fide*. The proper view to take of section 14 (1) (*b*) would be that whenever the condition of the building is not such as to require immediate demolition the case of the landlord should be scrutinised to find out whether he *bona fide* intends to im-

1. (1976) 1 M.L.J. 267: 89 L.W. 127.
2. (1967) 1 M.L.J. 110.
3. (1965) 2 M.L.J. 209.

mediately demolish the building or whether the provision is invoked merely with a view to evict the tenant. In that context the plans or schemes of the landlord, his resources, his getting sanction from the Municipal authorities for the reconstruction, etc., would have a bearing as tending to establish the *bona fide* requirement of the landlord. Section 14 (1) (*b*) is not rendered inapplicable merely because the building is not old or dilapidated but is in a good condition. In other words, if the intention of the landlord for demolition and reconstruction is proved to be genuine and not spurious or specious, he will be entitled to obtain an order for eviction under section 14 (1) (*b*), whether or not the condition of the building is such as to require immediate demolition, the age and dilapidated condition of the building not being a *sine qua non* for such eviction. In the case reported in *Panchamal Narayan Shenoy* v. *Basthi Venkatesha Shenoy*[1], while dealing with a case arising under the Mysore Rent Control Act, 1961, the Supreme Court observed as follows:—

"The proviso to section 21 (1) enumerates the various circumstances under which a landlord may seek to recover possession of the property, from his tenant. The requirement contemplated under clause (*j*) of the proviso to sub-section (1) (analogous to section 14 (1) (*b*) of the Act) is that of the landlord and it does not have any reference to the condition of the building as such. What is necessary under that clause is that the landlord must satisfy the Court that he reasonably and *bona fide* requires the premises for the immediate purpose of demolishing it and the demolition is for the purpose of erecting a new building in the place of the old one. No doubt, as to whether the landlord's requirement is reasonable and *bona fide* has to be judged by the surrounding circumstances, which will include his means for reconstruction of the building, and other steps taken by him in that regard. In considering the reasonable and *bona fide* requirement of the landlord under this clause, the desire of the landlord to put the property to a more profitable use after demolition and reconstruction is also a factor that may be taken into account in favour of the landlord. In our opinion it is not necessary that the landlord should go further and establish under this clause that the condition of the building is such that it requires immediate demolition."

6. In the case reported in *Pappu Ammal* by *Agent Paul Nadar* v. *Messrs. Lab Chemicals and P. S. Palani Chetty*[1], Nainar Sundaram, J., held that where the landlord has got means to carry out the work of demolition and reconstruction and where there was no finding that the building is in a sound condition so that that factor may be taken into consideration to negative the *bona fides* of the landlord, the landlord is entitled to an order of eviction under section 14 (1) (*b*) of the Act. We have to apply the principles laid down in the above decisions to the facts of this case. The landlord had proved his means beyond doubt. Apart from producing Rs. 35,000 in Court he has produced balance statement in the Bank account under Exhibit A-6 which shows the balance of Rs. 9,267. Apart from that the landlord had produced the sale deeds Exhibits A-4, A-5 and A-7 in respect of the properties standing in his name and in the name of his wife showing that he has got the means to undertake demolition. He has also submitted plans to the Corporation and had the same sanctioned under Exhibit A-3 and the same had also been renewed as per Exhibit A-9. The condition of the building is also such that the claim of the landlord for the purposes of demolition and reconstruction is not rendered *mala fide*. In dealing with a case with similar facts in the case reported in *Messrs. K. P. Lonappan and Sons* v. *S. Mohammed Iqbal*[2], Gokulakrishnan, O.CJ., observed as follows:

"In this case, there is a clear finding by the Courts below that the building is an old one and from the evidence it is clear that it had cracks on the floor and on the walls and the wooden frames are partially eaten away and have become hollow in certain places. The Courts below have also assessed the age

1. (1970) 2 S.C.J. 601: (1970) 3 S.C.R. 734: A.I.R. 1971 S.C. 942.

1. (1978) 1 M.L.J. 523: 91 L.W. 219: I.L.R. (1978) 2 Mad. 321: A.I.R. 1979 Mad. 272.
2. (1981) 94 L.W. 282.

of the building as 50 to 55 years. The fact that this building got partially damaged due to the fire accident in the adjacent building was also taken into consideration by the Courts below. On these facts, there is a definite finding that the building is an old one and it requires demolition and reconstruction. I am therefore of the opinion that the authorities below have applied their mind regarding the existing condition of the building and have correctly come to the conclusion that the building requires demolition and reconstruction."

7. Even the Supreme Court in the decision reported in *Metalware & Co. etc.* v. *Bansilal Sarma and others etc.*[1], observed that the existing condition of the building is a relevant factor to be considered in assessing the *bona fides* of the landlord in the matter of a claim under section 14 (1) (*b*) of the Act.

8. Under the circumstances taking into consideration the condition of the building, the means of the landlord and the situation of the property, *viz.*, in a busy commercial locality and the fact that the landlord had already submitted a plan and had the same sanctioned, the claim of the landlord cannot be said to be *mala fide*. All the indications point out that the claim of the landlord for the purpose of demolition and reconstruction is *bona fide* and the finding of the appellate Court in this regard cannot be said to incorrect. Hence the civil revision petition is dismissed. In view of the fact that the tenants are conducting the business for a considerable time it is a fit case where six months time will have to be granted for delivery of possession. Hence six months time is granted to the tenants for delivery of possession to the landlord. There will be no order as to casts.

R.S. —— *Petition dismissed*

1. (1980) 1 M.L.J. (S.C.) 1: (1978) 2 S.C.J. 377: (1979) 3 S.C.C. 398: A.I.R. 1979 S.C. 1559.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

Everest Pictures Circuit, Salem, represented by its Proprietor, Nallaswami Gounder .. *Petitioner**

v.

S. Karuppannan .. *Respondent.*

Copyright Act (XIV of 1957), *sections* 55, 62 *—Suit for declaration and injunction—Tamil talkie film — Lease of film in favour of the plaintiff—Defendant attempting to release the same picture — Suit filed by plaintiff before District Munsif—Contention of defendant that District Munsif had no jurisdiction—Contention accepted by District Munsif who ordered the return of plaint — Appeal by plaintiff to District Judge—District Judge holding District Munsif had jurisdiction — Revision to High Court by defendant — Held civil Court may grant the relief of declaration but injunction can be granted only by District Court under section* 62 *of the Copyright Act.*

The plaintiff obtained the lease of the right to exhibit a Tamil talkie film from one *S*. The defendant attempted to release the same film. Therefore the plaintiff filed a suit for a declaration and permanent injunction in respect of the film before the District Munsif's Court. The defendant raised the objection that the District Munsif's Court had no jurisdiction to try the suit and that the suit was not maintainable. This objection was accepted by the District Munsif who ordered the return of the plaint. The plaintiff filed an appeal to the District Court which held that the District Munsif had jurisdiction. The defendant filed a revision to the High Court.

Held, the civil Court might grant the relief of declaration as to who was entitled to the copyright. But further reliefs with reference to injunction, accounting etc., could only be obtained under section 62 of the Copyright Act, from the Court having jurisdiction, *viz.*, District Court. [*Para.* 3.]

Since the present suit was one for declaration and injunction and no useful purpose would

*C.R.P. No. 1886 of 1981.
30th October, 1981.

be served by granting the mere relief of declaration, the only course available to the learned District Munsif was to return the plaint for presentation to the proper Court.

[*Para.* 3.]

Case referred to:—

S. Dharmalinga Nayakar v. *D. Balasubramania Ayyar,* A.I.R. 1937 Mad. 94.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court, Salem, dated 9th April, 1981 and made in C.M.A. No. 17 of 1981 against (O.S. No. 2136 of 1979-D.M.C. Salem).

Raghavan, for *T. V. Ramanujam* and *K. Balasubramanian* and *T. Muralidharan,* for Petitioner.

Jagadeesan, for Respondent.

The Court made the following

ORDER.—This civil revision petition filed against the final order of the learned District Judge of Salem passed in C.M.A. No. 17 of 1981, which itself is an order in the civil miscellaneous appeal arising from the judgment of the learned District Munsif of Salem in O.S. No. 2136 of 1979, directing the return of the plaint in O.S. No. 2136 of 1979 on the file of the Court of the District Munsiff of Salem for presentation to the proper Court. The respondent herein who is the plaintiff in O.S. No. 2136 of 1979 is a Film Distributor. The negative right of the Tamil Talkie film called "Petralthan Pillaya" was sold to one Ms. Saraswathi, who was doing the business under the name and style of M|s. Saraswathi Film Circuit. She had every right to deal with the distribution of the said film. On 26th October, 1978, the said Saraswathi and the respondent herein (the plaintiff in the suit) entered into an agreement by which she leased the right to exhibit the said film in the Revenue Districts of Salem and Dharmapuri for a period of 99 years from 1st January, 1979 for proper and valuable consideration. According to the said agreement the respondent herein was entitled to make his own arrangement for the required number of prints necessary for the exhibition and exploitation of the said picture. To enable the respondent herein to obtain the necessary print the said Saraswathi had passed a letter addressed to M|s. Vijaya Productions (P) Limited, Madras-26, requesting them to print and supply the required number of prints to the respondent herein at his own costs as she had granted the lease-hold right of the said picture. When the civil revision petitioner, who is the defendant in the suit, made an attempt to release the same picture and when the respondent herein approached the civil revision petitioner to know his rights, he did not say anything except saying that he is going to release the picture. Since the attempt on the part of the civil revision petitioner trying to release the picture is unlawful the respondent herein filed a suit in O.S. No. 2136 of 1979, for a declaration and permanent injunction in respect of the above said picture. The contention of the civil revision petitioner, who is the defendant in the suit, is that the suit is not maintainable and the District Munsif's Court had no jurisdiction to try the suit. The existence of the very agreement between Saraswathi and the respondent herein is challenged by the civil revision petitioner. The learned District Munsif tried issue No. 1, *viz.*, Whether the District Munsif's Court has no jurisdiction, as a preliminary issue and accepted the contention of the civil revision petitioner, the defendant in the suit, that as per section 62 of the Copyright Act, 1957, hereinafter referred as the Act, the suit ought to have been instituted only in the District Court and ordered the return of the plaint. As against the order of the learned District Munsif returning the plaint the respondent herein, who is the plaintiff in the suit, filed an appeal in C. M.A. No. 17 of 1981 on the file of the Court of the District Judge of Salem. The learned District Judge taking the view that the adjudication in the suit relates to the question as to whether the alleged agreement in favour of the plaintiff or the alleged agreement in favour of the defendant is to prevail, that the suit is only a civil action which does not call for adjudication under the provisions of the Act and in the suit neither the question of passing off or limitation or any other question relating to copyright is involved, set aside the order of the learned District Munsif and directed the District Munsif to dispose of the suit in accordance with the law. As against the said decision of the learned District Judge this civil revision petition is filed.

2. Before entering into a discussion regarding the matter in issue it will be useful to refer to the relevant provisions of the Copyright Act. Section 13 of the Act, which deals with the works in which copyright subsists, is as follows:—

"13 (1). Subject to the provisions of this section and the other provisions of this act, copyright shall subsist throughout India in the following classes of works, that is to say,

(*a*) ....

(*b*) cinematograph films, and

(*c*) ....

(2) ....

(3) Copyright shall not subsist—

(*a*) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work:

(*b*) ....

(4) The copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made.

(5) ....".

Section 14 of the Act deals with the meaning of copyright which reads as follows:—

"14. (1) For the purposes of this Act, 'copyright' means the exclusive right, by virtue of, and subject to the provisions of, this Act—

(*a*) ....

(*b*) ....

(*c*) in the case of a cinematograph film, to do or authorise the doing of any of the following acts, namely:—

(i) to make a copy of the film;

(ii) to cause the film, is so far as it consists of visual images, to be seen is public and, in so far as it consists of sounds, to be heard in public;

(iii) to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track;

(iv) to communicate the film by radio-diffusion."

Section 51 of the Act dealing with the infringement of copyright, reads as follows:—

"51. Copyright in a work shall be deemed to be infringed—

(*a*) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright; or

(ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for believing that such performance would be an infringement of copyright, ..."

Section 55 of the Act dealing with the remedies for infringement of copyright, reads as follows:—

"55. (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right:

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable.

(2) ....

(3) ...."

Section 62 of the Act dealing with the jurisdiction of Courts, reads as follows:—

"62. (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of any other right conferred by this Act shall be instituted in the District Court having jurisdiction.

(2) ...."

Bearing those provisions in mind we have to decide whether the above said suit for declaration and injunction is maintainable in the Court of the District Munsif of Salem. In any given case the question of jurisdiction will have to be decided with reference to the plaint allegations. The case of the plaintiff, the respondent herein, in the suit is that he is the only person who is entitled to release, exhibit and exploit the said film within the Revenue Districts of Salem and Dharmapuri for a period of 99 years by virtue of an agreement, dated 26th October, 1978 entered into by them with one Saraswathi, who was entitled to the distribution rights of the picture in question. The case of the defendant, the civil revision petitioner herein, is that as per the letter of arrangement, dated 21st August, 1978, executed by one Raghunathan, the husband and power agent of Saraswathi, the defendant was given the exclusive lease-hold rights of distribution, exhibition and exploitation of the picture in question and 37 other pictures, for the areas of Salem and Dharmapuri districts. Hence the defendant is entitled to the exclusive right of exploiting the said picture in the above said areas. The rights of the plaintiff under the agreement, dated 26th October, 1978 itself is disputed by the defendant in the suit. As per section 14 of the Act, copyright in respect of a cinematograph film confers the right: (1) to make a copy of the film; (2) to cause the film, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public. Hence the plaintiff can be said to have a copyright only if he proves that by reason of agreement, dated 26th October, 1978 he became entitled to such a right. If the agreement, dated 26th October, 1978 entered into between the plaintiff and the above said Saraswathi is admitted then the plaintiff can be demed to possess the copyright in respect of the said film. But when the agreement itself is not admitted unless the plaintiff proves his right by acceptable evidence it cannot be said that he is entitled to the copyright of the above said film. Whether the plaintiff is entitled to the copyright under the agreement, dated 26th October, 1978 or not is a civil dispute and the civil Court has jurisdiction to decide the same. But if the civil Court comes to the conclusion that the plaintiff is entitled to have the right to exhibit the above said film, then the plaintiff can only be said to be entitled to a copyright in respect of the film and the civil remedies for the infringement of such copyright as provided under section 55 of the Act is available to the plaintiff. Under section 55 of the Act where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided in the Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by the abovesaid Act. The only exception being that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable. As already stated the remedy for an infringement can be had only from the District Court having jurisdiction as per section 62 of the Act. Section 62 says that every suit or proceedings arising in respect of the infringement of copyright shall be instituted in the District Court having jurisdiction.

3. In the ultimate analysis the civil Court may grant the relief of declaration as to who is entitled to the copyright. But further reliefs with reference to injunction, accounting, etc., can only be obtained under section 62 of the Act from the Court having jurisdiction *viz.*, the District Court. In the case reported in *S. Dharmalinga Nayakar* v. *D. Balasubramania Ayyar and another*[1], a single Judge of this Court while considering whether the civil Court can be allowed to grant the relief of mere declaration in respect of a similar question observed as follows:—

> "The only relief left is a declaration that the plaintiff is the author of the book in question. As regards this relief the learned City Civil Judge says that the plaintiff even on his own showing is entitled to other consequential reliefs besides a bare declaration, and that no useful purpose would be served by granting a relief of this kind to the plaintiff. I entirely agree. After all, the grant

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1. A.I.R. 1937 Mad. 94.

of a declaration is a matter of discretion and I think the learned City Civil Judge exercised a wise discretion in nipping a suit for a declaration of this kind in the bud instead of wasting his own time and that of the defendants in trying a suit for a mere declaration like this. The appeal is really hopeless and I would even say frivolous. The plaintiff|appellant was definitely told to present his plaint to the proper Court. Instead of doing that he has preferred a baseless and hopeless appeal. The appeal is dismissed with costs."

Adopting the same reasoning since the present suit is one for a declaration and injunction and no useful purpose will be served by granting the mere relief of declaration, the only course available to the learned District Munsif is to return the plaint for presentation to the proper Court.

So far as the adjudication as to who is entitled to a declaration in respect of rights over the picture it is a matter coming within the jurisdiction of the civil Court having jurisdiction. But a mere declaration will not carry the purpose any further and the further consequential reliefs flowing from such a declaration clearly fall within the reliefs that can be got under section 55 of the Act, which can only be granted by the District Court under section 62 of the Act. Adopting the reasoning in the decision cited above I have no hesitation is holding that instead of permitting the civil Court to grant a declaration which is of no use, the interests of justice will be better served and multiplicity of proceedings can be avoided by directing the return of the plaint to be presented to the proper Court having jurisdiction. Further the court-fee was paid under section 25 (*c*) of the Court-fees Act, which relates to the court-fee payable for reliefs under the Copyright Act. If the suit is not one contemplated under the Copyright Act, then the relief of declaration and injunction will have to be valued according to the other provisions of the Act and the minimum valuation of Rs. 500 will not be available to the plaintiff. Inasmuch as the suit itself is valued under section 25 (*c*) of the Court-fees Act, the above suit can only be said to be a suit for the reliefs provided under section 55 of the Act.

4. In the light of the above reasoning I have no hesitation in setting aside the order of the learned District Judge and restore the order of the learned District Munsif by directing the plaint in O.S. No. 2136 of 1979 on the file of the Court of the District Munsif of Salem to be returned to the plaintiff for the re-presentation to the proper Court.

5. In the result the civil revision petition is allowed and the order of the learned District Judge is set aside and the order of the learned District Munsif is restored. The plaint will be represented within eight weeks from this date. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O. CJ.*

Victory Laminations, represented by its Partner T. Jayaraman .. *Petitioner**

v.

Plastolite Industries, represented by its Proprietor Bbikanchand Baid and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 8-*A —Money suit against firm pending—Application by defendant for issue of notice to two erstwhile partners of the firm—Application dismissed as belated by trial Court—Order held untenable.*

In a suit to recover money advanced to a partnership firm by means of a cheque, an application was made for issue of notice under Order 8-A, Civil Procedure Code, to two specified persons alleged to be erstwhile partners of the firm. The trial Court dismissed the application. On revision,

Held, it has been clearly averred by the petitioner herein that he wants indemnification from the two proposed respondents since they were partners at the time when the concerned cheque was issued by the plaintiff to the partnership concern. No doubt Order 1, rule 13 of the Code of Civil Procedure, speaks about objections as to non-joinder or misjoinder of parties in the suit, but this is a case wherein the defendant wants to invoke the third party procedure available to him under the Code. Hence there is no relevancy in quoting Order 1, rule 13 of the Code to support the contention of the plaintiff in the suit. Despite the delay in this case, the right of the petitioner to invoke the procedure laid down under Order 8-A can be safeguarded provided a *prima facie* case is made out and the ends of justice served. On the facts such a *prima facie* case is made out and the ends of justice would be served by permitting the petitioner to invoke the third party procedure to implead respondents 2 and 3. [*Para.* 3.]

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*C.R.P. No. 491 of 1981.
5th November, 1981.

V. Syamalan and *N. Venkataraman,* for Petitioner.

N. D. Jose and *N. K. Mohideen,* for Respondent.

The Court made the following

ORDER.—The defendant in O.S. No. 2026 of 1978, on the file of the City Civil Court, Madras is the petitioner herein. The plaintiff in the suit wanted to recover back a sum of Rs. 28,040 being the principal and interest of the amount advanced to the defendant by means of a cheque. The defendant is Messrs. Victory Laminations represented by its partner T. Jayaraman. It raised various contentions in the written statement. The said suit is pending and the petitioner herein filed I.A. No. 15485 of 1980 for issue of notice under Order 8-A of the Code of Civil Procedure to one T. Shanmugam and S. Jayalakshmi. In the affidavit filed in support of this petition, the petitioner herein has alleged that these parties were partners of Victory Laminations and even before they left the partnership, this cheque was issued by the plaintiff in the suit. It is further contended by the petitioner that these two persons who are sought to be impleaded as respondents are liable to indemnity the petitioner herein and the other partners of the firm. Hence it is prayed that notice under Order 8-A of the Code of Civil Procedure may be issued to the proposed respondents 2 and 3. The trial Court, without properly appreciating the usual procedure dismissed the application. No doubt the trial Court has stated that the application is belated. It is against this order the present revision petition has been filed.

2. Mr. Syamalan, the learned counsel appearing for the petitioner, after pointing out the averments made in the affidavit filed in support of the application filed under Order 8-A of the Code of Civil Procedure, submitted that in order to claim indemnity, it is necessary that the proposed respondents must be made parties to the suit. This argument is opposed by Mr. Jose, the learned counsel appearing for the plaintiff in the suit on the ground that the application is belated, that it is filed in order to protract proceedings and that since the defendant has failed to implead these respondents under Order 1,

rule 13, Civil Procedure Code, he must be held to have waived his right. The learned counsel appearing for the proposed respondents 2 and 3 submitted that as per the deed of dissolution, they are not liable to pay and they are unnecessary parties to the suit.

3. I have carefully gone through the facts of the present case. It is clear that under Order 8-A of the Code of Civil Procedure, a defendant in the suit can get the leave of the Court to issue a notice to third parties. The order reads:

"8-A. (1) Where a defendant claims to be entitled to contribution from or indemnity against any person not already a party to the suit (hereinafter called a third party), he may, by leave of the Court, issue a notice (hereinafter called a third party notice) to that effect, sealed with the seal of the Court. The notice shall state the nature and grounds of the claim. Such notice shall be filed into Court with a copy of the plaint and shall be served on the third party according to the rules relating to the service of summons".

It has been clearly averred by the petitioner herein that he wants indemnification from the two proposed respondents since they were partners at the time when the cheque was issued by the plaintiff to the partnership concern. No doubt Order 1, rule 13 of the Code of Civil Procedure speaks about objections as to non-joinder or misjoinder of parties. This is not a case wherein the defendant wants to raise a contention either of non-joinder or misjoinder of parties in the suit, but this is a case wherein the defendant wants to invoke the third party procedure available to him under the Code. Hence I do not think there is any relevancy in quoting Order 1, rule 13 of the Code to support the contention of the plaintiff in the suit. No doubt there is a delay in this case. Nevertheless, the right of the petitioner to invoke the procedure laid down under Order 8-A can be safeguarded provided a *prima facie* case is made out for the issue of such notice. As the facts stand the cheque was issued by the plaintiff as early as 26th November, 1975. The partnership was dissolved on 15th February, 1976. It is only after 15th February, 1976, the proposed respondents went out of the partnership. No doubt it is argued on behalf of the proposed respondents that they are not liable to pay the suit amount not any indemnity can be claimed against them. All these contentions can be effectively agitated in the main suit itself. We are now only at the stage of issuing a notice under Order 8-A, Civil Procedure Code. Inasmuch as a *prima facie* case is being made out by the defendant in the suit to claim indemnity from the proposed respondents, I am of the view that the ends of justice would be served by permitting the petitioner to invoke the third party procedure in order to implead respondents 2 and 3. In these circumstances, the civil revision petition is allowed and I.A. No. 15485 of 1950 is ordered as prayed for. Since the suit is of the year 1978, the trial Court is directed to dispose of the same before the end of January, 1982. The respondents 2 and 3 herein are at liberty to contest the claim of the petitioner herein without in any way being prejudiced by the observations made in this order. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Sethuraman, JJ.*

Pandiyan Roadways Corporation, Madurai, through its Managing Director .. *Appellant**

v.

Karunanithi (Minor) by his father and next friend B. Purushothaman and another .. *Respondents.*

Motor Accident Claim—Three boys riding a cycle—Bus coming in the opposite direction—Two dogs fighting nearby—Cyclist disturbed by dog-fight losing balance and falling down—Front wheel of bus coming into contact with the right arm of one of the boys—Claim petition filed by injured person — Tribunal finding bus driver as having last opportunity to avoid the accident and negligent—Compensation awarded—Order upheld.

The claimant was travelling with his brothers on a cycle. His younger brother was seated in the back seat. The cycle was proceeding from north to south. At that time, a city bus belonging to Pandiyan Roadways Corporation was coming from south to north. Two dogs were fighting with each other on the road. At first they came in front of the bus. On seeing the dogs, the bus driver slowed down the bus. The dogs proceeded towards the cycle. In order to avoid the dogs, the brother of the injured slightly turned the cycle towards his right and he lost his balance. The three occupants of the cycle fell down. While the claimant fell down on the right side in front of the cycle, the other two brothers fell down on the left. At that time the front wheel of the bus came into contact with the right arm of the claimant and the tyre tore-off all the muscles of the right hand and the bones were visible. The injured person filed a claim petition. The Motor Accident Claims Tribunal held that the last opportunity to avoid the accident was only with the bus driver and accordingly awarded compensation against the Pandiyan Roadways Corporation. The Corporation filed the present appeal to the High Court.

Held, where three immature persons were riding on a cycle, and were disturbed by a dog fight, the reaction of any bus driver acting reasonably would have been to stop the vehicle, especially when the vehicle had slowed down because of the dogs and the presence of a bus stop at a short distance. This is a clear case of negligence on the part of the driver and the Corporation, his employer, was rightly held liable. [*Para.* 18.]

Cases referred to:—

Sukhraj Bhuj v. *Calcutta State Transport Corporation,* A. I. R. 1966 Cal. 620; *Delhi Transport Corporation* v. *Shabir Ahmed,* 1972 A.C.J. 465; *The Motor Owner's Insurance Company Ltd.* v. *Smt. Sharda Thackar,* 1974 A.C.J. 239; *Davias* v. *Maun,* (1842) 10 M. & W. 546: 152 E. R. 588; *Boy Andrew (Owners)* v. *St. Regnvald,* (1948) A.C. 140; *Davies* v. *Swan Motor Company (Swansea) Ltd., James, Third Party,* (1949) 2 K.B. 291; *Chan Lee Kheen* v. *Lai Siew San,* 1971 A.C.J. 408.

Appeal against the order of the Motor Accidents Claims Tribunal (IV Additional Subordinate Judge), Madurai, dated 15th February, 1979, and made in M. A. C. O. P. No. 112 of 1978.

P. Pandi, for Appellant.

K. Jayaraman for *P. Ananthakrishnan Nair,* for Respondents.

The Court made the following

ORDER.—The Pandiyan Roadways Corporation has filed this appeal against an award of compensation passed by the Motor Accident Claims Tribunal, Madurai, in M.A.C.O.P. No. 112 of 1978.

2. On 13th February, 1978, at about 8-30 A.M. the claimant was travelling with his brother in a cycle. His younger brother was seated in the back seat. The cycle was coming from north to south near the Indian Bank Colony, Natham Road, Madurai. At that time the city bus TMN 5186 belonging to the appellant and driven by the second respondent was coming from south to north. The cycle was proceeding on the left side of the road. Two dogs were fighting with each other. At first they came in front of the city

*A.A.O. No. 341 of 1979.

2nd July, 1981.

bus. On seeing the dogs the second respondent slowed down the bus and the dogs proceeded towards the cycle. In order to avoid the dogs, the brother of the injured slightly turned the cycle towards his right and he lost his balance. The three occupants of the cycle fell down. While the claimant fell down on the right side in front of the cycle, the other two brothers fell down on the left. At that time the front wheel of the bus came into contact with the right arm of the claimant and the tyre tore-off all the muscles of the right hand and the bones were visible. If the driver of the bus had completely stopped the vehicle, the accident, according to the claimant, would not have taken place. The claimant, therefore, alleged that the injury to his hand was solely due to the negligence of the second respondent and that the appellant was vicariously liable. The compensation claimed was Rs. 50,000 made up of Rs. 500 for extra nourishment, Rs. 5,000 for pain and suffering and Rs. 44,500 for continuing or permanent disability and for loss of earning power.

3. The appellant denied any rashness or negligence on the part of the driver and contended in its statement before the Tribunal that the accident was brought about solely by the careless manner in which the brother of the claimant was driving the cycle. An objection was also taken to the amount of compensation claimed.

4. On the allegations of the respective parties, the Tribunal framed two points, which arose for consideration as follows:

(1) Whether the accident was due to the rash and negligent driving of the second respondent of the city bus TMN 5186 belonging to the first respondent? and

(2) If so, what is the amount of compensation to be awarded and from which of the respondents, whether from the Corporation or from its driver?

5. P.W. 3, the claimant's brother, who drove the cycle, in his evidence stated that the driver of the bus saw them falling down and that he did not even stop the bus. He stated that the bus was at a distance of about 6' at the time of the brother falling down.

6. P.W. 4, who was an eye-witness, speaks to the boys' falling down and the driver of the bus not stopping it. According to him, the bus was proceeding slowly, because there was a bus stop ahead and after seeing the dogs fighting he further slowed it down. He stated that the boys, who travelled in the cycle, get frightened, lost their balance and fell down. According to him, the bus was at a distance of about 10' when the boys fell down.

7. The driver of the bus gave evidence as R.W. 1. He also stated that the boys fell down when the bus was at a distance of about 3 or 4' that he applied brakes and that the bus stopped at a distance of 1½ or 2'. In cross-examination he admitted that even if the brake was applied immediately, the bus would stop at a distance of about 2'.

8. On an appreciation of the evidence the Tribunal came to the conclusion that the last opportunity to avoid the accident was only with R.W. 1, the driver, that the fighting of street dogs and the consequent falling down of the claimant and his brothers from the cycle could not be treated as acts of negligence on their part and that the accident was solely due to the negligence of the driver. He gave Rs. 15,000 as compensation for the injuries sustained; Rs. 4,000 for pain and suffering and Rs. 500 for extra nourishment that was required during the long period of the treatment. In all Rs. 19,500 was awarded. The claimant was in the hospital for five months and subsequently had been visiting the hospital for treatment. The claimant is not in a position to use his forearm and right hand, like a normal person, and the extent of disability is about 40%. Taking into account all these aspects, the above amount of compensation has been awarded.

9. In the present appeal, the learned counsel for the Pandiyan Roadways Corporation contended that this is a clear case in which the accident was solely due to three persons riding on a bicycle, that the bus was coming on its own side of the road, that the anxiety of the bus driver to avoid the injury even to the dogs would show that he was careful as a reasonable man would be and that the loss of control over the cycle and the falling of the claimant in front of the bus and the subsequent damage to his arm could not be attributed to the appellant's driver.

10. For the respondents the submission was that the driver ought to have noticed the on-coming cycle and that if the driver had applied the brakes instead of driving the vehicle further on, there would have been no scope for the accident.

11. In support of his submission the learned counsel for the appellant relied on a decision of the Calcutta High Court in *Sukhraji Bhuj* v. *Calcutta State Transport Corporation*[1], in which it has been laid down that the duty of one driving an omnibus was merely to take reasonable care not to do harm to others by the manner in which he drives the omnibus and that if somebody would sweep down all on a sudden in front of a fast vehicle like an omnibus without anything like a warning to the driver it would hardly be fair to accuse the driver of the bus of negligence. In that case the deceased jumped off a running tram—car and came into contact with the right rear wheel of the omnibus. It was held that the bus driver was not to be blamed. It was pointed out that if the deceased boy had put himself on the road long or sometime before the omnibus had reached the point where he was, the driver would have been negligent and that when the boy put himself on the road all on sudden, the stigma of negligence could not be put upon the driver.

12. We do not see how this case is of any assistance to the appellant. As found on the facts therein, the boy jumped down from a moving vehicle and the driver of the bus could not have had an opportunity of anticipating it. It was, therefore, clear that the driver could not be found fault with.

13. The learned counsel referred us to two other decisions *viz.*, *Delhi Transport Corporation* v. *Shabir Ahmed*[2] and *The Motor Owner's Insurance Company Ltd.* v. *Smt. Sharda Thackar and others*[3]. In the first case which was decided by the Delhi High Court, a person was crossing the road. He had hardly gone 4 to 5 yards when he saw a bus coming on the road. The bus had to reach the place to which the person crossing was also going. On seeing the bus, he stopped going further and turned his cycle back to the other side. It was at that stage he was hit by the bus. It was held that it would not be justifiable to say that the bus driver should have anticipated that the cyclist would retrace his steps on seeking the bus approaching him, nor it would be proper to say that the driver should have slowed down the bus sufficiently in order to stop the bus immediately, particularly in view of the fact that the bus had stopped at the point of impact.

14. In the other decision, the *Motor Owner's Insurance Company Ltd.* v. *Smt. Sharda Thackar and others*[1], decided by a learned single Judge of the Orissa High Court, the driver had cleared the traffic safely. But somebody for some reason or other got below the chassis and was run over by the rear wheel. The Court held that the driver was helpless against such unforeseen circumstances and that there could be no actionable wrong. Even here, it is clear that the driver was not to be blamed, because after proceeding up to a particular point, he could not see any person falling under the *rear* wheel and injuring himself. There was no possibility or scope for avoiding the accident. Thus, these two cases also are of no assistance to the appellant.

15. The Tribunal has used the expression "last opportunity". The Tribunal seems to consider that, between the cyclist and the bus driver, the bus driver had the last opportunity to avoid the accident and, therefore, he has to be held liable. The rule of "last opportunity" was first laid down in *Davies* v. *Mann*[2]. The applicability of this doctrine was set at rest by a decision of the House of Lords in *Boy Andrew (Owners)* v. *St. Regnvald*[3]. The decision of the House of Lords dealt with a case of collision between two ships. One ship was trying to overtake the other and under the rules applicable to the ships, a ship which was being overtaken had

1. A.I.R. 1966 Cal. 620.
2. 1972 A.C.J. 465.
3. 1974 A.C.J. 239.

1. 1974 A.C.J. 239.
2. (1842) 10 M. & W. 546: 152 E.R. 588.
3. 1948 A.C. 140.

to keep to its course. Unfortunately, the ship that was being overtaken suddenly swerved and, therefore, there was a collision between the overtaking vessel and the overtaken vessel. The overtaken vessel sank with all hands. The cause of this swerve was not known. It was held that both the vessels, by synchronous faulty navigation, contributed to causing the accident, the overtaken vessel by failing to keep her course and the overtaking vessel by making a pass too close, and that there was no question of considering which of the vessels had the last opportunity of avoiding the result of the other's negligence. The report of the Law Revision Committee (Cmd 6032 of 1939 at page 16) running as follows was cited:

> "In truth, there is no such rule .... the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?"

It was pointed out by the House of Lords that the suggested test of "last opportunity" seems to be have been inaptly phrased and likely in some cases to lead to error.

16. After referring to this decision, it was pointed by the Court of Appeal in *Davies* v. *Swan Motor Company (Swansea) Ltd. James, Third Party*[1], that the doctrine of "last opportunity" fell into disrepute and was superseded by the simple test: what was the cause, or what were the causes of the damage? Thus, causation was the decisive factor.

17. In the present cause, we have to find out as to what is the cause of the accident. The accident here is the running over of the arm of the boy aged about 6. The driver was in a position to look out as to what was happening in the front. He saw the dogs fighting and he must have seen the boys coming in the cycle. If only he had stopped the vehicle, as a prudent man would have, he would have avoided the accident. The fact that he alleges that he did not see the boy falling until he came too close is not decisive of the question of negligence. Admittedly the cyclist was coming on at a slow speed and there was also a bus stop ahead. When he saw the boys coming in front and the dogs fighting with each other, he could have easily anticipated that the dogs would not be stationary before an on-coming bus and even likely to run this way or that. He should have immediately stopped the bus, so that neither the dogs nor the boys would have been injured. It is this doctrine of "last opportunity" having gone into disrepute that is referred to in the decision of the Federal Court of Malayasia in *Chan Lee Khee* v. *Lai Siew San and others*[1]. It is unnecessary to deal with the said decision except to mention that in that case a car which had been stopped by the driver on a highway and which was mistaken by the on-coming traffic as one on the move, was damaged. The Court held that leaving the vehicle on the middle of the road was the cause of the accident and the on-coming traffic was not responsible for it.

18. It has been pointed out that a higher degree of care is due from those who knew of or ought to anticipate the presence of disabled or *immature* persons. *See* Halsbury's Laws of England, Third Edition, Volume 28, page 11, paragraph 9. This is such a case. When three immature persons were riding in a cycle, and were disturbed by a dog-fight, the reaction of any person acting reasonably would have been to stop the vehicle, especially when the vehicle had slowed down because of the dogs and the presence of a bus stop at a short distance. It has therefore to be held that this is a clear case of negligence on the part of the bus driver.

19. It is also argued that there was contributory negligence on the part of the claimant, as he was one of the three persons going on a cycle, which was against the rules. Assuming that three boys should not have gone together in a cycle, it does not mean that the bus driver is entitled to injure them. If they had contravened any rule of the road, that would have to be dealt with by the appropriate authorities and not by the bus driver hitting and injuring them. A boy of six cannot be found to (*sic*) be guilty of any negligence as he has not attained the age of

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1. (1949) 2 K.B. 291.

1. 1971 A.C.J. 408.

discretion to realise the consequence of his acts.

20. Further the contention regarding contributory negligence had not been taken before the Tribunal. Being a matter on which evidence would have to be led and considered, if such a plea had been taken at the appropriate stage, we do not feel called upon to go into it further.

21. We do not find any circumstance, on the basis of which we can reduce the quantum of compensation, when the boy's right arm has more or less become useless and he has been on prolonged treatment. The damage is permanent, so to say, and we, therefore, find no justification for reducing the estimate of compensation from Rs. 19,500.

22. The appeal is accordingly dismissed. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and R. Sengottuvelan, JJ.*

United India Fire and General Insurance Co., Limited, Madurai .. *Appellant**

v.

M. S. Durairaj and others

.. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 110 (c)—*Oral evidence, contrary to pleadings—Whether can be permitted to be adduced — Comprehensive policy — Prohibition against carrying passengers for hire or reward — Policy not covering risk.*

Held: A party cannot be allowed to go behind his pleadings and let in evidence contrary to the same. If the averments in the pleadings originally set out required modification on the ground of mistake etc., it may be open to the party to have the pleadings amended with leave of the Court and then adduce evidence in accordance with the amended pleadings. [*Para.* 12.]

Section 110 (*c*) of the Motor Vehicles Act, says that 'in holding any enquiry under section 110 (*b*), the Claims Tribunal may, subject to any rules that may be made in this behalf follow such summary procedure as it thinks fit". But the said expression given to the Tribunal to formulate its procedure has to be consistent with rules of natural justice and must not contravene the provisions of law. If the oral evidence is permitted to be adduced by one party contrary to his own pleadings, the other party will naturally be taken by surprise and there will clearly be failure of the rules of natural justice; it cannot be disputed that the Tribunal has got the power to permit a party to amend his pleadings. [*Para.* 12.]

The Insurance Policy contains the following clause under the head of limitation as to use:—

"The policy does not cover use for hire or reward ....".

"Use only for social, domestic and pleasure purposes and for the insured's business".

If the deceased was carried in the car for hire, then there has been a use of the car for an unauthorised purpose. In view of the above terms contained in the policy, the Insurance Company cannot be held liable. [*Para.* 12.]

Cases referred to:—

Bihar Co-operative Motor Vehicle Insurance Society v. *Rameshwar Raut*, A.I.R. 1970 Pat. 172; *Shafudeen* v. *M. I. Fandya*, (1971) 12 Guj.L.R. 97; *Manjit Kaur* v. *M. S. Vanochand Insurance Co., Ltd.*, (1969) A. C. J. 286; *Bright* v. *Ashfold*, (1932) 2 K.B. 153; *Motor Insurers' Bureau* v. *Carmell*, (1970) A.C.J. 144; *Pushpabai* v. *M/s. Ramjit Ginning and Pressing Co.*, (1977) A.C.J. 343.

Appeal against the order of the Motor Accidents Claims Tribunal IV Additional Sub-Court, Madurai, dated 26th November, 1977 and made in M.A.C.O.P. No. 36 of 1976.

K. S. Narasimhan, for Appellant.

A. Ramanathan, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—This is an appeal filed by the United India Fire and General Insurance Company Limited, Madurai, against the

*A.A.O. No. 78 of 1978.

23rd February, 1981.

award passed by the Motor Accidents Claims Tribunal, Madurai in M.A.C.T.O.P. No. 36 of 1976, at the instance of the claimants|respondents 1 to 8 herein.

2. On 27th October, 1975, one Alagappan aged about 32 years, who was a Senior Clerk of the State Bank of India, Kodaikanal, was returning from Madurai to Kodaikanal in a car MDA 1194 which was owned by 9th respondent and driven by the 10th respondent herein. At about 6 A.M. when the car was going in front of the Paravai Mill gate in Samayanallur on the Dindigul Main Road, the driver of the car lost control of the vehicle and the car went to the left end of the road and hit against a tree and as a result of the impact, the gear rod caused grievous injury on the stomach of Alagappan. He was immediately taken in a bus to the Government Hospital, Madurai, where he died the next day. The said car had been insured with the second respondent (appellant herein) in the Original Petition before the Tribunal. On the ground that the said accident was due to rash and negligent driving of the car by its driver, the legal representatives of the deceased Alagappan claimed a compensation of Rs. 75,000 before the Motor Accidents Claims Tribunal, Madurai.

3. In the said claim petition respondents 1 and 3, owner of the car and the driver respectively, remained *ex parte* and the claim was resisted only by the insurer, second respondent. The objection taken by the insurer was that as it has been mentioned in the claim petition, itself that the car was used for carrying passengers on hire, which was against the terms of the insurance policy, the insurer was not liable, that in any event there was no rashness and negligence on the part of the driver of the car, that the car was proceeding slowly and cautiously on the proper side of the road at a moderate speed of 35 KM per hour, that there was drizzling at the time and in a turning the car skidded to the left and hit against a tree and that, therefore, the accident cannot be said to be due to rashness and negligence on the part of the driver of the car. It was also contended that since the injuries sustained by the deceased were very slight, the claim by the legal representatives of Alagappan for compensation of Rs. 75,000 is highly exaggerated.

4. After going through the counter-affidavit filed by the insurer, a reply affidavit was filed by the claimants, wherein they had again asserted that Alagappan, Arokiaswami and one Velumani travelled in the car on payment of Rs. 15 as hire charges. Further, they have stated that the deceased Alagppan was getting actually a salary of Rs. 1,067 per month at the time of his death.

5. On these pleadings the following two points were set down for consideration by the Tribunal:

(1) Whether the accident took place on account of rash and negligent driving of the first respondent's car by the third respondent?

(2) Whether the petitioners are entitled to compensation, and to what extent and against whom?

6. On the side of the claimants, the first claimant had been examined as P.W. 1 and another person, who travelled in the car during the time of occurrence, had been examined as P.W. 2. P.W. 1 had spoken to generally about the occurrence and the death of his son as a result thereof. He has marked Exhibit P-1, Pay Certificate given by the Branch Manager in relation to pay particulars of the deceased. Exhibit P-2 is a copy of the post-mortem certificate, Exhibit P-3 extract from the death register, Exhibit P-4 S.S.L.C. Book of the deceased, Exhibit P-5 certificate from the branch Manager about the date of joining of the deceased in the bank and Exhibit P-6 copy of the Motor Vehicles Inspector's report. P.W. 2 had deposed about the facts relating to the accident. On the side of the respondents, no oral evidence was adduced and only Exhibit P-1 the policy of insurance had been marked.

7. On the first point as to whether there was any rashness and negligence on the part of the driver of the car, the Tribunal, after analysing the oral and documentary evidence above referred to, held that the car was driven in a rash and negligent manner, that the accident was entirely due to such rashness and negligence on the part of the driver of the car. On the second point relating to the quantum of compensation and the person who is liable to pay the same, the

Tribunal held that a sum of Rs. 75,000 is a fair and reasonable compensation. In that view it passed an award for the said sum in favour of claimants 2 to 4 as against respondents 1 to 3. The Tribunal had taken the view that the first claimant being the father of the deceased, and claimants 5 to 8 being his brother and sisters cannot be held to be dependants or legal representatives and that only the mother and children of the deceased, who are claimants 2 to 4 are entitled to claim the compensation as dependants as well as heirs-at-law of the deceased. The said award has been challenged by the appellant-insurer of the car.

8. The main contentions advanced on behalf of the appellant are as follows: (1) That the car, having been used for carrying passengers for hire or reward contrary to the terms of the insurance policy, the insurer is not liable for the accident which had taken place when the car was used for an unauthorised purpose. (2) That even if the car has not been used for carrying the passengers for hire or reward, and the deceased was taken only as a gratuitous passenger the liability of the insurer will not extend to such gratuitous passengers.

9. In this case on the first question the learned counsel for the appellant has referred to the claim petition wherein the claimants have stated that the deceased paid hire charges and travelled in the car which was being used as an illicit taxi. Taking note of this averment in the claim petition itself, the Insurance Company in its counter had disclaimed the liability on the ground that the car has been used for an unauthorised purpose. At least after seeing the counter-statement, the claimants should have waken up. However, the claimants filed a reply statement asserting that the deceased Alagappan was carried in the vehicle on payment of hire charges. At the stage of trial, however, the first claimant examined as P.W. 1 deposed that the deceased was given a free lift by the driver of the car from Madurai to Kodaikanal and P.W. 2 had also deposed that himself and two other persons travelled in the car without payment of any hire charges. An objection was taken by the insurer that oral evidence cannot be let in contrary to the pleadings. The claimants had contended that 'no doubt a blunder has been committed in preparing the petition, since the averments had been made on the representations of the petitioner No. 1 and the petitioner No. 1 had not witnessed the accident properly and he has spoken to hear say". According to the claimants they knew about the free lift only at the stage of trial. The Tribunal accepted the said new stand taken on behalf of the claimants mainly on the basis of the evidence of P.W. 2. The Tribunal felt that as the counsel had expressed regret that the petition had been drafted on wrong information given by the claimants, and as the counsel had to do justice to his clients and put forward a genuine version of the case in the enquiry, some amount of latitude in the assessment of the averments in the claim petition relating to the use of the car as a taxi has to be allowed and that on the oral evidence of P.W. 2, an independent witness, who had also travelled in the car at the time of the accident, it must be held that the car was not used as a taxi and the deceased was given only a free lift. The said finding of the Tribunal has been attacked by the appellant as legally unsustainable.

10. We are of the view that the Tribunal is in error in accepting the evidence of P.W. 2 at its face value. It is true P.W. 2 has stated that he, the deceased, and another were carried in the car gratuitously from Madurai to Kodaikanal. But, it is difficult to accept that statement unless the owner or driver of the car is either related to the persons carried or a close friend of them. The driver or the owner are admittedly utter strangers to the persons who were carried in the vehicle. It is unlikely that the driver of the car would have agreed to give them free lift from Madurai to Kodaikanal, without any hire or reward. It is not claimed, as a matter of fact, by P.W. 2 that he knew either the owner or the driver of the car before the date of the accident. Thus, the probability is that the driver of the car carried the deceased and other persons in the car which was proceeding from Madurai to Kodaikanal only for hire or reward.

11. According to the appellant, the claimants are in any event, not entitled to go behind their pleadings which contain a categorical averment that the deceased was travel-

ling in the car on payment of hire charges and adduce evidence that he was carried in the car gratuitously which is contrary to the pleadings, and the Tribunal has no justification or jurisdiction to show any latitude in this regard. It is pointed out by the appellant that even if there is a mistaken averment both in the original claim petition as well as in the reply statement, the Court can permit the claimants to have their pleadings amended setting out the correct averments and then allow the claimants to adduce evidence on the basis of the amended pleadings and it is not legally possible for the claimants to adduce oral evidence contrary to their own pleadings. There is considerable force in the submission made by the appellant in this regard.

12. It is well established that a party cannot be allowed to go behind his pleadings and let in evidence contrary to the same. If the averments in the pleadings, as originally set out, required modification on the ground of mistake, inadvertence etc., it may be open to the party to have the pleadings amended by taking leave of the Court and then adduce evidence in accordance with the amended pleadings. That being the legal position, we do not see how the Tribunal in this case without having the pleadings amended, permitted the claimants to adduce evidence contrary to the pleadings. Though the Tribunal in permitting oral evidence to be adduced contrary to the pleadings, has obviously been motivated by some sympathetic consideration to be shown to the claimants and their counsel, we do not see how the Tribunal can on grounds of sympathy go behind the statutory procedure. It is true that section 110 (*c*) of the Motor Vericles Act, says that:

> "in holding any enquiry under section 110-B, the Claims Tribunal may, subject to any rules that may be made in this behalf follow such summary procedure as it thinks fit".

But, the said expression given to the Tribunal to formulate its procedure has to be consistent with rules of natural justice and must not contravene the provisions of law. If the oral evidence is permitted to be adduced by one party contrary to his own pleadings, the other party will naturally be taken by surprise and there will clearly be failure of the rules of natural justice, it cannot be disputed that the Tribunal has got the power to permit a party to amend his pleadings. In *Bihar Co-operative Motor Vehicles Insurance Society* v. *Rameshwar Raut and others*[1], the Claims Tribunal has been held to be competent to give permission for amendment of the pleadings, when such amendment does not prejudice any accrued right of any party. The fact that the Tribunal is invested with the power to adopt summary procedure for a speedy disposal of the claim petitions, does not mean that it can ignore a salutary rule of law which ensures that the parties can adduce evidence only with reference to their own pleadings. The said position does not differ whether the Claims Tribunal is considered to be a Court or *persona designata*. Though the Claims Tribunal is invested with the status different from a civil Court, it undoubtedly possesses all the attributes of the Court and for all intents and purposes it is a civil Court. It has been as held in *Shafudeen* v. *M. I. Fandya and another*[2]. The Claims Tribunal like other Courts of law must not ignore the rule that every document must be proved before it is relied upon — vide *Manjit Kaur and another* v. *M|s. Vanochand Insurance Co., Ltd.*[3]. Section 110-C says that the summary procedure to be followed by the Claims Tribunal shall be subject to any rules that may be made in that behalf. In view of what has been stated above, the Tribunal in this case should not have allowed the claimants to go behind their pleadings and to contend that the deceased was a gratuitous passenger, without amending their pleadings. If such a thing were permitted, it will lead to an anomalous situation where the claimants' case as per the pleadings will be different from the case as presented at the enquiry and the opposite party will be at a disadvantageous position, for he will have to meet two cases. This will be obviated if the Tribunal has permitted the claimants to amend their pleadings and to adduce oral evidence in pursuance of the amended pleadings. The Tribunal has held that the deceased was carried as a gratuitous passenger ignoring the pleadings in the claim petition as well as in the reply statement filed by them. If the deceased was carried for

1. A.I.R. 1970 Pat. 172.
2. (1971) 12 Punj.L.R. 97.
3. 1969 A.C.J. 286.

hire that will be a purpose not authorised by the terms of the insurance policy Exhibit R-1. The policy contains the following clause under the head of Limitation as to use:—

> "The policy does not cover use for hire or reward ....".
>
> "Use only for social domestic and pleasure purposes and for the insured's business".

If the deceased was carried in the car for hire, then there has been a use of the car for an unauthorised purpose. In view of the above terms contained in the policy, the Insurance Company cannot be held liable. We are not on the question now whether the driver of the car was authorised by the owner to take passengers for hire or reward. As already pointed out, the Award had been passed in this case both against the driver as well as the owner of the car and that portion of the Award has became final. Therefore, it is unnecessary, in this appeal to go into the question as to whether the owner of the car is vicariously liable or not. We are only concerned with the case whether the car has been put to an unauthorised use so as to enable the insurer to disclaim the liability to indemnify the owner of the car under the terms of the insurance policy. In view of our finding that the deceased was not a gratuitous passenger it is unnecessary to go into the question as to whether the insurer will be liable for the death of the deceased who was carried in the car as a gratuitous passenger.

13. The learned counsel for the claimants would contend that the policy in this case is a comprehensive one and therefore, the policy should be taken to cover the death or a bodily injury to a passenger travelling in the car for hire or reward. The learned counsel refers to a decision in *Bright* v. *Ashfold*[1]. In that case, a policy had been taken containing a clause that the Insurance Company shall not be liable for any accident loss or damage caused or sustained, while any motor cycle in respect of which indemnity is granted under this policy, is carrying a passenger unless a side-car is attached. The insured drove the motor cycle on a road with another person sitting behind him as a passenger on the pillion without a side-car being attached to the motor cycle. He was charged with the offence of using a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third party risks as required by part II of the Road Traffic Act, 1930. While construing section 38 of the Road Traffic Act, 1930, the Court held that even if a passenger in a motor vehicle was treated as a third party his risk should also be covered by a policy required to be taken under the Road Traffic Act, 1930. However the view taken in this case has not been accepted as correct in later decisions. In *Motor Insurers' Bureau* v. *Connell*[1], ... the Court of Appeal while construing section 203 of the Road Traffic Act, 1960, which corresponds to section 95 of the Motor Vehicles Act, held that the owner of a private car is not bound to insure passengers even if he had occasionally given lift upon payment. In that case, the owner of a private car gave lift to another, who offered him to pay for it. The car met with an accident, and the person sustained injuries. On his filing an action for compensation, a question arose whether, in the circumstances, the car could be said to be a vehicle in which passengers are carried for hire or reward within the meaning of the clause as used in section 203, so as to make it compulsory for the owner to insure such a passenger. The Court held that a private owner of a car was not bound to insure passengers even if he gave a man lift for hire or reward and that the insurance was compulsory only if a vehicle was as a practice or habitually used for carrying passengers for hire or reward such as is the case of taxis, motor coaches, private hire cars and the like. Unless there was a habitual carrying of passengers for hire or reward there was no statutory necessity to obtain a policy covering risks to passengers.

14. Lord Denning, M.R., speaking for the Bench held that as the car, in which the deceased travelled agreeing to pay some amount as reward, was not a vehicle in which passengers were normally or habitually carried for hire

1. (1932) 2 K.B. 153.

1. 1970 A.C.J. 144.

or reward, it was a private vehicle and lift was given to a passenger on two or three occasions and that therefore the owner of the car is not bound to insure against injury to the passenger. Lord Denning wound up his judgment with the following observations:

> "I would only add this: many people think the Act should be altered so as to provide compulsory insurance for passengers. I think so too. It is very hard on a passenger that he should be injured by the negligence of the driver—and have no recourse for damages. I hope the Parliament will soon remedy the position. Meanwhile, I would suggest that any one who asks for or accepts a lift should ask the driver 'are you insured for passengers or not'? for, if he is not, and there is an accident, he will be unable to get any compensation".

The above observations have been taken note of by the Parliament and the Motor Vehicles (Passenger Insurance) Act, 1971, had been enacted to make insurance cover for passenger liability compulsory by repealing paragraph (*a*) and the proviso of sub-section 203 (4) which came into force on 1st December, 1972.

15. The Supreme Court in *Pushpabai* v. *M/s. Ramjit Ginning and Pressing Co.*[1]. while dealing with the scope of section 95 of the Motor Vehicles Act, 1939, as amended by Act LVI of 1969, had pointed out that neither the Road Traffic Act, 1960 or the earlier 1930 Act required users of motor vehicles to be insured in respect of liability for death or bodily injury to passengers in the vehicle except in the case of a vehicle in which passengers were carried for hire or reward or by reason of or in pursuance of a contract of employment, that sub-section 203 (4) of the 1960 Act provided that the policy shall not be required to cover liability in respect of death or bodily injury to persons being carried in or upon, or entering or getting on to or alighting free, the vehicle at the time of occurrence of the event out of which the claims arise. The Supreme Court also referred to the law, as regards general exclusion of passengers as stated in Halsbury's Laws of England, Third Edition, Volume XXII at page 368, para. 765 which is as follows:—

> "Subject to certain exceptions a policy is not required to cover liability in respect of the death of or bodily injury, to a person being carried in or upon, or entering or getting into or alighting from the vehicle at the time of the occurrence of the event out of which the claim arises."

Dealing with the plea that the words 'third party' are wide enough to cover all persons except the person and the insurer, the Supreme Court held that the insurance cover is not available to the passengers is made clear by the proviso to the sub-section, which provides that a policy shall not be required:—

> "(*iii*) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises."

The Supreme Court held that

> "it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As under section 95, the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured."

According to the learned counsel for the respondent, though it is not compulsory for the owner of a car to insure against the passengers either carried for hire or reward or gratuitously still he can take a comprehensive policy to cover such risks, which are required to be covered under section 95 of the Act and that in this case a comprehensive policy having been issued, it should be taken to cover the risk of passengers as well. But as already pointed out, the policy on the face of it says that it will not cover the use of the vehicle for hire or reward. We have already found that in this case the deceased was carried in the vehicle for hire or reward and such use is clearly prohibited by the terms of the policy. Section II, Liability to third parties—of Insurance Policy (Exhibit P-1) is limited in

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1. 1977 A.C.J. 343.

respect of the liability of the insurer in relation to death of or bodily injury to any person to the extent necessary to meet the requirements of section 95 of the Motor Vehicles Act, 1939. Construing the identical clause, the Supreme Court, held in *Pushpabai* v. *Ranjit Ginning and Pressing Co.*[1], that the word 'except so far as is necessary to meet the requirements of section 95 of the Motor Vehicles Act, 1939' would indicate that the liability is restricted to the liability arising out of the statutory requirements under section 95 and the second part of clause 1 (*a*) refers to the non-liability for injuries arising in the course of employment of such person. In view of the above pronouncement of the Supreme Court, it is not open to the claimants in this case to contend that the policy Exhibit R-1 issued in this case which is said to be comprehensive, cannot be said to cover the risk in respect of passengers carried in the vehicle for hire or reward, in respect of whom there is a prohibition under the policy.

16. In this view of the matter, we have to set aside the award passed by the Tribunal so far as the appellant is concerned. The award of the Tribunal as against respondents 1 and 3, therein will stand. The civil miscellaneous appeal is therefore allowed. There will however be no order as to costs.

17. The learned counsel for the respondents seeks leave to appeal to the Supreme Court, but, in the circumstances we do not think that this is a fit and proper case for the grant of leave. Hence, leave sought for is refused.

R.S. ——— *Civil miscellaneous appeal allowed.*

1. 1977 A.C.J. 343.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Sathiadev, J.*

R. Govindarajulu .. *Petitioner**

v.

The Superintendent of Police, Salem and another .. *Respondents.*

Fundamental Rules, rule 56 (d)—*Compulsory retirement—Order of—Should not contain any stigma—Nor be by way of transitional or intermediary step before other punishments are imposed—Constitution of India* (1950), *Article* 226.

In an order passed under Fundamental Rule 56 (*d*) what has to be looked into is, whether the order on the face of it discloses misconduct etc., and if it does not contain any stigma, normally, the Court sustains such an order.

Unless the impugned order is the final curtain drawn resulting in the Government servant honourably being relieved from service, the resort to Fundamental Rule 56 (*d*) cannot be allowed to act as a transitional or intermediary step before other punishments are imposed.

What is pertinent and to be assured for the ejected Government servant is that, in the eye of the public he should not figure out as a person who has been relieved of the office because of misconduct or due to lack of integrity etc. The power under Fundamental Rule 56 (*d*) has to be strictly adhered to, so that, on being relieved from service the concerned person is given a chance to make good in other walks of life without a stigma at the time of termination.

The motivating factor is not relevant but if it be established that the misconducts alleged are the foundation of the impugned order and a short circuit is adopted for achieving what perhaps could not be achieved in the disciplinary proceedings, such orders of compulsory retirement cannot be upheld. [*Para.* 32.]

*W.P. No. 4636 of 1978 and W.P. No. 545 of 1979.

19th October, 1981.

Cases referred to:—

Nepal Singh v. *State of Uttar Pradesh,* (1980) 2 S.C.J. 179: (1980) 3 S.C.C. 288: (1980) 6 All.L.R. 350: (1980) Lab.I.C. 747: A.I.R. 1980 S.C. 1459; *State of Uttar Pradesh* v. *Ram Chandra Trivedi,* (1976) 4 S.C.C. 52: (1977) 1 S.C.R. 462: A.I.R. 1976 S.C. 2547; *State of Uttar Pradesh* v. *Sughar Singh,* (1975) 1 S.C.J. 12: (1974) 2 S.C.R. 335: A.I.R. 1974 S.C. 423; *State of Punjab* v. *P. S. Cheena,* (1975) 4 S.C.C. 84: A.I.R. 1975 S.C. 1096; *State of Punjab* v. *Shri Sukh Raj Bahadur,* (1969) 1 S.C.J. 51: (1968) 3 S.C.R. 234: A.I.R. 1968 S.C. 1089; *Shamsher Singh* v. *State of Punjab,* (1975) 1 S.C.R. 814: A.I.R. 1974 S.C. 2192; *Champaklal Chimmanlal Shah* v. *The Union of India,* (1964) 5 S.C.R. 190: A.I.R. 1964 S. C. 1854; *Oil and Natural Gas Commission* v. *Dr. Iskender Ali,* (1980) 3 S.C.C. 428: (1980) 2 S. C. R. 93: A.I.R. 1980 S.C. 1242; *State of Maharashtra* v. *V. R. Sabaji,* (1980) 1 S.C.R. 551: (1979) 4 S.C.C. 466: A.I.R. 1980 S.C. 42; *Shyam Lal* v. *The State of Uttar Pradesh,* 1954 S. C. J. 493: (1955) 1 M. L. J. 730: (1955) 1 S.C.R. 26: A.I.R. 1954 S.C. 369; *R. S. Sial* v. *State of Uttar Pradesh,* (1975) 3 S.C.C. 111: (1974) 3 S. C.R. 754: A.I.R. 1974 S.C. 1317: *State of Bihar* v. *S. B. Mishra,* (1971) 2 S.C.J. 68: (1971) 2 S.C.R. 191: A.I.R. 1971 S. C. 1011; *Munney Khan* v. *The State of Madhya Pradesh,* (1971) 1 S.C.R. 943: A. I.R. 1971 S.C. 1491; *Madan Gopal* v. *State of Punjab,* (1963) 3 S.C.R. 716: A.I.R. 1963 S.C. 534.

Petitions under Article 226 of the Constitution of India, praying in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue a Writ of Prohibition prohibiting the first respondent herein from proceeding with the enquiry, dated 17th May, 1978 in his R.C. No. P.R. 1268 of 1976 (in W.P. No. 4636 of 1978); (2) Writ of *certiorari* calling for the records of the respondent relating to G.O. Ms. No. 2749, Home Department, dated 13th October, 1977, and quash the said order and made therein.

V. P. Raman, for *B. Sriramulu,* for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents.

The Court made the following

ORDER.—W.P. No. 545 of 1979 is filed by the petitioner challenging the order of compulsory retirement passed under Fundamental Rule 56 (*d*) on 13th October, 1977. As the time of passing of the order, he was functioning as Deputy Superintendent of Police in Tamil Nadu Police Service.

2. Petitioner entered service as a Sub-Inspector of Police on 1st September, 1948, and he attained the age of 50 years on 14th July, 1977. A charge memo. dated 25th February, 1976 was framed under rule 17 (*b*) of Tamil Nadu Civil Services (Classification, Control and Appeal) Rules to which he submitted a memorial on 28th February, 1976 to the Inspector-General of Police stating that he would prefer proceedings being referred to Disciplinary Proceedings Tribunal instead of being tried by departmental officers. On 27th May, 1976, he was informed that his request cannot be conceded, as none of the charges against him specifically involves corruption. Therefore the enquiry was directed to be held by the Superintendent of Police, Dharmapuri. Later on it was transferred to the file of the Superintendent of Police, Salem, by an administrative order. On 24th October, 1976, he issued a charge memo. to the petitioner listing out the charges in respect of which he proposed to hold an enquiry.

3. In the meanwhile in G.O. Ms. No. 2749, Home Department, dated 13th October, 1977, the respondent passed the impugned order of compulsory retirement of the petitioner by invoking Fundamental Rule 56 (*d*) and he was immediately relieved of the post of Deputy Superintendent of Police (Excise), Thanjavur West. Being aggrieved with the said order, he filed a review petition, and it was dismissed on 20th July, 1978.

4. While so, within 2 months of the order, dated 13th October, 1977, a memo. was issued on 30th December, 1977, by Superintendent of Police, Salem, stating that he intends to proceed with the enquiry on 9th January, 1978 in respect of the charges which were framed earlier to the order of compulsory retirement. On 5th January, 1978, petitioner sent a peti-

tion stating that he having been already retired and ceased to be a public servant, the proceedings cannot be continued, but this was not acceptable to the enquiry officer and he replied on 9th January, 1978, stating that as per the Circular of the Government, dated 8th September, 1976, he has to continue the oral enquiry, and that the Deputy Inspector-General of Police, Madras, by communication, dated 27th December, 1977, had also directed the enquiry to be continued. On 17th May, 1978, the petitioner again represented that he can no longer be subjected to the Rules governing Government servants, and therefore the Superintendent of Police, Salem had no jurisdiction to conduct any further enquiry, against a retired, Government servant. Since he persisted in the enquiry to be proceeded with, petitioner agreed to participate in the enquiry, without prejudice to his rights and contentions. The Superintendent of Police, Salem has relied upon Article 351-A of Civil Service Regulations for continuing disciplinary proceedings as against the petitioner, in spite of compulsory retirement, ordered under Fundamental Rule 56 (*d*).

5. Therefore, being aggrieved with the order of compulsory retirement and also of the continuance of the disciplinary proceedings, the petitioner had come forward to file W.P. No. 545 of 1979 challenging the order of compulcory retirement, and W.P. No. 4636 of 1978 to issue a writ of prohibition preventing the conduct of the enquiry by the two respondents therein.

6. In the counter-affidavit filed only in W. P. No. 545 of 1979, it is stated that the Directorate of Vigilance and Anti-Corruption had reported that there is a *prima facie* case against the petitioner on the five allegations mentioned in paragraph 3 of the counter-affidavit. As the petitioner had been compulsorily retired under Fundamental Rule 56 (*d*) and as "his conduct and character came to adverse notice only when he was serving as Deputy Superintendent of Police, Directorate of Vigilance and Anti-Corruption, Salem, detachment" the compulsory retirement ordered is justifiable and there is no bar in the continuance of the disciplinary proceedings for the charges which had been pending disposal, when the petitioner was compulsorily retired. It is again reiterated that "as already stated, the conduct and character of the writ petitioner came to adverse notice warranting his exit from the department" and that though the report of the Directorate of Vigilance and Anti-Corruption do not specify corruption, still serious charges warranting his elimination from service existed being instances of misbehaviour touching his integrity. As the petitioner had been retired compulsorily in public interest under Fundamental Rule 56 (*d*), no stigma is caused to the petitioner, as he is entitled to "all the benefits of a retired Government servant".

7. Mr. V. P. Raman, learned counsel for the petitioner contends that, if an order of compulsory retirement under Fundamental Rule 56 (*d*) results in any stigma being attached, or after the order is passed proceedings are taken to deprive the benefits assured and to expose the retired public servant to ignominy, aspersions etc., then the order of compulsory retirement deserves to be set aside. His contention is rested on the continuance of the disciplinary proceedings in spite of the order of compulsory retirement under Fundamental Rule 56 (*d*), and when such proceedings are continued by the State, in the minds of the public a firm impression has already been drawn that because of the charges which are being further pursued or proceeded with, the order of compulsory retirement had been passed. He claimed that when the Officer has maintained a good record immediately preceding the impugned order, and even according to the respondent when no charge of corruption was involved as against the petitioner, the impugned order had been passed without the required materials and further it was punitive in character.

8. He refers to the counter-affidavit wherein it is stated that:

> "the allegations contained in the report of the Directorate of Vigilance and Anti-Corruption, though do not specify corruption, are serious enough to warrant his elimination from service as instances of misbehaviour touching his integrity have been reported in the above report".

Again in the counter-affidavit, it is stated that:

> "his conduct and character came to adverse notice only when he was serving as Deputy Superintendent of Police, Directorate of Vigilance and Anti-Corruption, Salem. detachment".

When the charges were framed against the petitioner on 25th February, 1976, he asked for the enquiry to be conducted by the Disciplinary Proceedings Tribunal rather than by a departmental personnel, but it was rejected by letter, dated 29th May, 1976, stating that as no charges of corruption are involved, there is no need to accede to his request. Hence when no such serious charge of corruption is involved, and if the allegations which are mentioned in paragraph 3 of the counter-affidavit have alone been taken into account for passing the impugned order, he would then contend that the factors taken into account were no different from the charges which were framed as against petitioner in the disciplinary proceedings and hence the order was passed on unestablished allegations. A comparison of the allegations which are relied upon in the counter-affidavit and the charges framed on 24th October, 1976 discloses that they are identical. Hence, he pleads that if the same allegations are further proceeded with in disciplinary proceedings, after compulsory retirement, even though the impugned order on the face of it, may not contain reasons, the subsequent conduct of the respondents has resulted in a stigma being attached to the petitioner.

9. Government Pleader in his turn would contend that the only thing to be looked into is, whether the impugned order, on the face of it, discloses any stigma or not, and if the order by itself cannot result in any aspersions or reflections being cast on the Government servant, the continuance of the disciplinary proceedings on the basis of the same allegations cannot be injected into the impugned order, and that such a proceeding is not illegal. If for any reason, it is to be construed that the continuance of disciplinary proceeding is illegal, it may be quashed, but it would not mean that the order of compulsory retirement deserves to be set aside.

10. Mr. V. P. Raman, learned counsel for the petitioner stresses on the reflections that had already been occasioned by the continuance of the disciplinary proceedings in that, immediately after 2 months of the order of compulsory retirement, he was served with the notice regarding continuance of the disciplinary proceedings, which certainly reflected on the conduct of the petitioner, and that in the disciplinary proceedings, if he is to be visited with punishment of dismissal, it would take away the benefits to which the petitioner is entitled to under order of compulsory retirement.

11. An order of compulsory retirement under Fundamental Rule 56 (*d*) can be sustained only if the benefits to which the petitioner is entitled to, are assured, but if it is to be taken away by instituting or continuing other proceedings, it cannot be a *'bona fide'* order of compulsory retirement.

12. Counsel for the State relies upon the decision in *Nepal Singh* v. *State of Uttar Pradesh*[1], which deals with a temporary Government servant being terminated on his general character and conduct taken into account, after dropping disciplinary proceedings.

13. He then refers to the decision in *State of Uttar Pradesh* v. *Ram Chandra Trivedi*[2], which also dealt with the termination of services of a temporary Government servant. An elaborate consideration of the entire case-law is found in this decision in the light of the counsel for the respondent therein urging that the constitutional position in regard to the order of the impugned nature is not well-settled, in view of the conflicting decisions of the Supreme Court particularly relating to the observations made in *State of Uttar Pradesh and others* v. *Sughar Singh*[3] and *State of Punjab* v. *P. S. Cheena*[4]. It was held therein that it is necessary to find out whether the Government servant has a right to the post and whether he had been visited with evil consequences such as forfeiture of pay etc., and if the order terminating a temporary servant or a probationer is a termination simpliciter without anything more; then Article 311 is not attracted. Even though misconduct, negligence, inefficiency or other disqualification may be the motive for the order of termination, unless these things from the very foundation of the order, and when there are no express words in the impugned order itself which **throw a stigma on the Government servant,**

1. (1980) 2 S.C.J. 179: (1980) 3 S.C.C. 288: (1980) 6 All L.R. 350: 1980 Lab. I.C. 747: A.I.R. 1980 S.C. 1459.
2. (1976) 4 S.C.C. 52: (1977) 1 S.C.R. 462: A.I.R. 1976 S.C. 2547.
3. (1974) 2 S.C.R. 335: (1975) 1 S.C.J. 12: A.I.R. 1974 S.C. 423.
4. (1975) 4 S.C.C. 84: A. I. R. 1975 S.C. 1096.

the Court would not delve into secretariat files to discover whether some kind of stigma could be inferred on such research. If the order *ex facie* is termination of service simpliciter, then the Court cannot be invited to go into the motive behind the order by claiming protection under Article 311 (2) of the Constitution.

14. This decision can be of no assistance, to the respondents because, in the instant case, petitioner had a right to hold the post; and secondly, apart from passing the impugned order, disciplinary proceedings are being continued which would visit with evil consequences, and from what has been stated in the counter-affidavit, it is founded on misconduct for which already proceedings have been initiated and not dropped while ordering compulsory retirement. Reference was made to the principle enunciated in the decision in *State of Punjab and another* v. *Shri Sukh Raj Bahadur*[1], wherein one of the 5 principles enunciated is that, if the public servant is visited with evil consequences or the order casts an aspersion against his character or integrity it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant. The holding of an enquiry has been construed as not always conclusive, but what is decisive is whether the order is really one by way of punishment. Reference was made in this context to the decision in *Shamshar Singh and another* v. *State of Punjab*[2], wherein it was held that "where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with, Article 311 will not be attracted, unless it can be shown that the order though unexceptionable in form, is made following the report based on misconduct. In conclusion it was held in *State of Uttar Pradesh* v. *Ram Chandra Trivedi*[3], that there have been no conflicting views existing and that the decision in *Sughar Singh's case*[4], shows that it was only following the law previously laid down by Court on Articles 311 (2) and 16 of the Constitution of India. It was a case in which no doubt explanations were called for and certain correspondence exchanged between the concerned authorities for imposing suitable punishment but ultimately instead of pursuing with further proceedings, the impugned order was passed without any express words throwing a stigma on the Government servant, and hence it was construed that it was not passed by way of punishment.

1. (1969) 1 S.C.J. 51: (1968) 3 S.C.R. 234: A.I.R. 1968 S.C. 1089.
2. (1975) 1 S.C.R. 814: A.I.R. 1974 S.C. 2192.
3. (1976) 4 S.C.C. 52: A. I. R. 1976 S.C. 2547.
4. (1975) 1 S.C.J. 12: (1974) 2 S.C.R. 335: A.I.R. 1974 S.C. 423.

15. He then refers to the decision in *Shamsher Singh and another* v. *State of Punjab*[1], which was relied upon in the earlier cited decision. It was held therein that in respect of termination of service of a probationer, the authority may be of the view that the conduct of the petitioner may result in dismissal or removal on enquiry, but may not hold it, but simply discharge the petitioner "with a view to giving him a chance to make good in other walks of life, without a stigma". It was further held therein that holding an enquiry is not always conclusive, but what is decisive is whether the order is really by way of punishment, and if the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment, then the petitioner's termination would attract Article 311. Where departmental enquiry was contemplated and if any enquiry is not in fact proceeded with, Article 311 will not be attracted unless it can be shown that the order though un-exceptionable in form, was made following a report based on misconduct.

16. He then referred to the decision in *Champaklal Chimmanlal Saha* v. *The Union of India*[2], wherein also it was held that even if a departmental enquiry against a Government servant was contemplated, but not pursued with, and no punitive action was taken against him on the basis of the memorandum issued, but later on a decision being taken not to hold a departmental enquiry but to terminate the services of the temporary servant, by an order *simpliciter*, then he cannot seek protection under Article 311. Such a preliminary enquiry may also be held *'ex parte'*. It is only when a decision is taken to hold

1. (1975) 1 S.C.R. 814: A.I.R. 1974 S.C. 2192.
2. (1964) 5 S.C.R. 190: A.I.R. 1964 S.C. 1854.

a regular departmental enquiry for the purpose of inflicting one of the three major punishments that the Government servant gets the protection of Article 311.

17. Yet another decision referred to is the one reported in *Oil and Natural Gas Commission and others* v. *Dr. Md. S. Iskender Ali*[1], which also dealt with a case of a probationer, whose services were terminated *simpliciter* without casting stigma, and it was held therein that when the power exercised flowed from the contract of service, termination cannot be termed as punishment.

18. In *State of Maharashtra* v. *V. R. Saboji*[2], it was held that in most of the cases what has to be done is to look to the order on the face of it and find out whether it casts any stigma, and that there is no presumption that the order is arbitrary or *mala fide,* unless a very strong case is made out and proved by the petitioner, who challenges such an order, in which event, files can be looked into in appropriate cases.

19. *Shyam Lal* v. *The State of U. P. and another*[3], is referred to for the limited purpose of impressing upon this Court that compulsory retirement is not punishment, and that the officer, so retired, will be entitled to the pension that he has actually earned and there is no diminution of the accrued benefits.

20. Mr. V. P. Raman, learned counsel for the petitioner in his turn, would refer to the decision in *Brij Behari Lal* v. *High Court of M. P.*[4], wherein it has been held that in passing an order of compulsory retirement under the Rules, it is desirable to make an overall assessment of the Government servant's record, and in this case no such adverse remaks had been made during such period.

21. It is not the duration, but what is impressed in these decisions is that, while passing an order of compulsory retirement *simpliciter,* what should prevail in the minds of the authorities should be to look into the immediate performance of the officer and to what extent he would be in a fit position to discharge his duties during the rest of the period and not to take into account some remarks passed in the distant past which could have no relevance because of the subsequent performance of the petitioner over the years of his service.

22. The conspectus of these authorities leads to the conclusion that in an order passed under F. R. 56 (*d*) what has to be looked into is, whether the order on the face of it discloses misconduct etc., and if it does not contain any stigma, normally the Court sustains such an order. It does not ordinarily and usually delve into the files, to find out whether there is any motive for the passing of the order on mere general statements made by petitioner unless a strong case or specific materials is placed by him. It is not as if the affected person cannot, in a fit matter, challenge the order on the ground that it had been passed on 'no materials' or was passed for collateral purposes or requisite opinion was not formed, or was arbitrary, or passed with '*mala fide*' intentions.

23. If the State to cast aspersions or stigma on a compulsorily retired servant, initiates or continues disciplinary proceedings and thereby discloses alleged acts of corruption, misconduct or lack of integrity as against him, then can it be held that the order was not punitive and passed in *bona fide* exercise of powers?

24. As held in *R. S. Sial* v. *State of U. P.*[1], it is not the form of the order which would be conclusive as to its true nature, but the entirety of circumstances preceding or 'attendant' on the impugned order must be examined by the Court, and the overriding test will always be to find out whether the misconduct is the real motivation or is the very foundation of the order. The decision in *Shamsher Singh's case*[2], already referred to is to the effect, that, in respect of departmental enquiry having been contemplated but not proceeded with, Article 311 will not be attracted, unless it be shown that the order though unexceptional in form was made following a report based on misconduct.

1. (1980) 3 S.C.C. 428: (1980) 2 S.C.R. 93: A.I.R. 1980 S.C. 1242.
2. (1979) 4 S.C.C. 466: (1980) 1 S.C.R. 551: A.I.R. 1980 S.C. 42.
3. 1954 S.C.J. 493: (1955) 1 M.L.J. 730: (1955) 1 S.C.R. 26: A. I. R. 1954 S.C. 369.
4. A.I.R. 1981 S.C. 594.

1. (1974) 3 S. C. R. 754: (1975) 3 S.C.C. 111: A.I.R. 1974 S.C. 1317.
2. (1975) 1 S.C.R. 814.

25. In the instant matter, while passing the order under F. R. 56 (*d*) respondents were conscious of the pendency of the disciplinary proceedings. In the counter-affidavit it is stated that the report of the directorate of Vigilance and Anti-corruption discloses a *'prima facie'* case and that his conduct came to adverse notice, and hence it warranted his elimination from service as instances of misbehaviour touching his integrity have been reported in the said report.

26. The file produced shows, that a suggestion has been made for dropping all the charges against the petitioner, on his being compulsorily retired. In spite of the impugned order being passed, respondents 1 and 2 in W.P. No. 4636 of 1978 have decided to proceed with the departmental enquiry. Even though repeatedly Courts have held that the order on the face of it must be looked into, if the circumstances disclose that the order is treated as a transitional punishment and the intention of the respondent was to proceed against the Government servant with the same charges as in the departmental proceedings, which have been initiated earlier, the foundation for passing of the order is thus made out. In the instant case, the impugned order is not a final curtain drawn on the petitioner, but a transitional step taken against him, with a deliberate intention to continue the departmental proceedings, which were pursued with by issue of notice of hearing within 2 months of the impugned order. The benefits to which he would be entitled to under the impugned order are attempted to be taken away, if ultimately he is to be dismissed from service in the departmental enquiry.

27. Furthermore, the continuance of disciplinary proceedings in spite of passing of the impugned order, would result in the public forming an opinion that, to adopt the words, used in the counter-affidavit, petitioner's "conduct and character come to adverse notice warranting his exit from the department because instances of misbehaviour touching his integrity have been reported". Therefore reliance placed by the Government Pleader that only the impugned order must be looked at and not all the other follow-up actions taken by the Government, cannot be accepted. In *The State of Bihar v. Shiva Bhikshukmishra*[1], it was held that the entirety of proceeding and 'attendant' circumstances can be looked into if the order is camouflaged or appears innocuous in form. Formation of *bona fide* opinion is a condition precedent. So is the view taken in *Shamshar Singh's case*[2], holding that the substance of the order be considered in deserving cases. As stated earlier, unless the impugned order is the final curtain drawn resulting in the Government servant honourably being relieved from service, the resort to F. R. 56 (*d*) cannot be allowed to act as a transititional or intermediary step before other punishments are imposed. Under these circumstances, it has to be held that the order lacks *'bona fides'* and passed in colourable exercise of powers as reflected by the follow up conduct of the respondents. The continuance of the proceedings, after the impugned order, has already vitiated the impugned order, and hence on this ground itself, it deserves to be set aside.

28. When a catena of decisions have held that an order of compulsory retirement would be vitiated, if it is to result in casting on the Government servant aspersions or reflections on his character or integrity or constitute a stigma, would these factors be relevant only to test how the form of the order exists or should they be considered also with reference to how he is affected by actions taken by State following the Order? The contention of the Government Pleader is that, if the words used in the impugned order do not bring about any of these reflections on the Government servant, whatever other acts done or actions taken by the State cannot in any manner vitiate the Order. If such is the restricted approach to be made, then, if for instance the State is to come forward immediately or later on with a press note or a statement being made by persons in charge of the affairs of the Government, that the order of compulsory retirement passed was issued because of his lack of integrity and that such a corrupt officer had been relieved of the post; can it then be held by a Court that the petitioner had not been stigmatised by the action under Fundamental Rule 56 (*d*)? What is pertinent and to be assured for the

1. (1971) 2 S.C.J. 68: (1971) 2 S.C.R. 191: A.I.R. 1971 S.C. 1011.
2. A.I.R. 1974 S.C. 2192.

ejected Government servant is that, in the eyes of the public, he should not figure out, as a person, who has been relieved of the office because of misconduct or due to lack of integrity etc. The power under Fundamental Rule 56 (*d*) has to be strictly adhered to, so that, on being relieved from service, the concerned person is given, 'a chance to make good in other walks of life without a stigma at the time of termination", as held in *Shamshar Singh's case*[1]. If this prospect, which is ensured, is in any manner transgressed by deliberate acts by the State following order of compulsory retirement, it would result in the order being vitiated, as having been passed in colourable exercise of such powers. In the instant case, as stated earlier, within two months of the order, the pending disciplinary proceedings were continued, and the petitioner was compelled to participate in it. By holding of such proceedings, the public have been made known that there are serious acts of misconduct committed by the petitioner, for which he was being proceeded with. The follow-up or attendant steps taken have certainly resulted in a stigma being cast on the petitioner, which cannot be effaced by withdrawal of the disciplinary proceedings after three and half years, and reported to Court at the conclusion of the arguments.

29. There is yet another point, which also by itself destroys the validity of the order. If it be made out that the impugned order was passed without forming the requisite opinion or on collateral grounds or arbitrarily arrived at or based on no materials or due to *mala fides*, it will be open to the petitioner to challenge the validity of the order. Therefore when it is contended that the charges framed alone were taken into account for passing the impugned order, it becomes all the more necessary to find out whether the order passed is vitiated by any of the aforesaid factors. It is contended that the same charges were taken into account for passing the impugned order. In paragraph 5 of the counter-affidavit it is stated that:

> "With regard to contention of writ petitioner in paragraph 9 of his affidavit, it is submitted that his conduct and character came to adverse notice only when he was serving as Deputy Superintendent of Police, Directorate of Vigilance and Anti-Corruption, Salem, detachment. The contention of the petitioner that there was no adverse remarks against him in the past and hence should be deemed as honest is untenable".

Records produced show that a suggestion was made that the charges be dropped, and the petitioner be compulsorily retired. Petitioner claims that his record of service is clean and no blemish whatsoever has been brought to his notice. In *Munney Khan* v. *The State of M.P.*[1] and *Madan Gopal* v. *State of Punjab*[2], it has been held that if a preliminary enquiry is held to find out whether disciplinary action requires to be taken or not and thereafter if an order of discharge is passed *simpliciter*, Article 311 of the Constitution would not be attracted.

30. In *Shamashar Singh's case*[3], it was held that holding an enquiry is not conclusive, and though the order is unexceptionable in form, the substance of it can be looked into to find out whether the action was taken following a report based on misconduct. In *Oil and Natural Gas Commission case*[4], it was held that even if misconduct and negligence, inefficiency formed the motive or inducing factor, still an order of termination *simpliciter* can be sustained. In *S. B. Mishra's case*[5], it was held that in each case the entire range of facts has to be carefully considered to find out whether the authority intended to punish him. If a strong case is made out the files have to be looked into was the view taken in *V. R. Sabaji's case*[6]. Therefore, if the materials taken into account only relate to charges framed in respect of which regular disciplinary proceedings have been already initiated even though they be dropped and if

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1. (1975) 1 S.C.R. 814: A.I.R. 1974 S.C. 2192.

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1. (1971) 1 S.C.R. 943: A.I.R. 1971 S.C. 1491.
2. (1963) 3 S.C.R. 716: A.I.R. 1963 S.C. 531.
3. (1975) 1 S.C.R. 814: A.I.R. 1974 S.C. 2192.
4. (1980) 3 S.C.C. 428: A.I.R. 1980 S.C. 1242.
5. (1971) 2 S. C. J. 68: A.I.R. 1971 S.C. 1011.
6. (1980) 1 S.C.R. 551: A.I.R. 1980 S.C. 42.

the delinquent is compulsorily retired, then he is entitled to claim that he has the constitutional right of protection under Article 311 to defend against the charges assailed against him, and establish to what extent they are without substance. Realising this in G.O. Ms. No. 369, Personal and Administrative Reforms (Personnel-R) Department, dated 25th March, 1980, it has since been directed that:

(*i*) the disciplinary proceedings that are being pursued against all the officers compulsorily retired under Fundamental Rule 56 (*d*) so far, shall be dropped and that no action need be pursued in such cases;

(*ii*) while recommending the cases of officers against whom disciplinary action is pending; the appropriate authority should decide either to compulsorily retire a Government Officer under Fundamental Rule 56 (*d*) or to pursue disciplinary proceedings against the officer; and

(*iii*) in cases where action has been initiated for imposing a major penalty and the proceedings are in final stages, the disciplinary proceedings shall be finalised instead of compulsorily retiring the officers under Fundamental Rule 56 (*d*).

31. If the order had been passed taking into account the character, nature of service rendered, and the suitability to the post to which he may be promoted in future etc., the outcome of the order would be different; but if it is based on the pending charges alone, it would be unsafe to hold that they form the materials because Government itself had not yet decided whether they are true or not. A charge framed by itself does not result in an opinion being formed about inefficiency, incapacity, inability or corrupt conduct of a Government servant. Unless it be established by a process known to law, and on which he should have an opportunity to disclose how far they are baseless or non-existent, the charges by themselves cannot be treated as sufficient materials for forming the requisite opinion under Fundamental Rule 56 (*d*). For instance, if in respect of a particular charge of corruption, he is straightaway able to show that the complainant is a fictitious person and on the relevant day mentioned therein, he was in a different place discharging his public duties, and if on such sort of a frivolous charge framed, but not pursued with, if the authority is to drop the proceedings, but relying upon that material alone pass an order of compulsory retirement, it will be tantamount to an opinion being formed on 'no material' whatsoever. As held in *V. R. Sabaji's case*[1], if the petitioner produces sufficient materials for delving into the files, then in exercising powers under Article 226, the petitioner will have the benefit of demonstrating to the Court about futility of the order and to what extent opinion had been formed either on collateral grounds or on 'no materials' or arbitrarily arrived at. Therefore when the same charges have been taken into account, which even according to the respondent required to be proved in the enquiry to be held against the petitioner, they being relied upon, have to be treated as materials which are non-existent as they are yet to be established. Even on this score, it has to be held that the impugned order was passed based on 'no materials' and the requisite opinion had not been lawfully formed.

32. There is yet another point on which also by itself the impugned order cannot be sustained. The order is founded on acts of misconduct alleged against the petitioner which are yet to be established. No doubt, the motivating factor cannot be relevant as held by the Supreme Court in the decisions above referred to, but if it be established that the misconducts alleged are the foundation of the order and a short circuit is adopted for achieving what perhaps could not be achieved in the disciplinary proceedings, such orders of compulsory retirement cannot be upheld. When the records show that in spite of what was suggested for the charges to be dropped and thereafter the petiioner be compulsorily retired, the disciplinary proceedings have been unabatedly pursued, and in the meanwhile, the order having been passed, it has turned out to be a punitive measure of a transitional nature, and it would be dependent on the outcome of the disciplinary proceedings in which he may be visited with grave punishments, which would deprive him of what are assured by an order under Fundamental Rule 56 (*d*). Therefore the impugned order, in this view, has to be treated, as punitive in nature.

1. A.I.R. 1980 S.C. 42.

33. Hence on the grounds above stated, each by itself results in the impugned order in W.P. No. 545 of 1979 being quashed.

34. The other contention of the Government Pleader is that, since the petitioner has filed W.P. No. 4636 of 1972, if the Court comes to the conclusion that the disciplinary proceedings cannot be continued, it may be stopped so that the order of compulsory retirement may be sustained. Such a course would not be available because of the aspersions or stigma that had been already suffered by the petitioner.

35. After the petitions stood adjourned for placing any other decisions by the respondents, just before the petitions were reserved for orders, it was reported by the Government Pleader that the disciplinary proceedings had since been dropped by order, dated 23rd July, 1981. No counter-affidavit is filed in W.P. No. 4636 of 1978. Eventhough the counter-affidavit in W.P. No. 545 of 1979 was sworn to on 24th July, 1981, and filed into Court only on 6th August, 1981, there is no reference to such an order having been passed. This is yet another petition, wherein this sort of omission is found. Eventhough the order is now handed over, when it has been held that the continuance of the proceedings had already resulted in aspersions and stigma on the petitioner, merely because disciplinary proceedings are dropped nearly 3½ years after filing of the writ petitions, it cannot result in holding that the impugned order alone must be looked at. Now that the disciplinary proceedings are claimed to have been dropped, this fact is recorded and since the Court would not issue a futile writ, W.P. No. 4636 of 1978 is dismissed.

36. W.P. No. 545 of 1979 is allowed with costs. Advocate's fee is fixed at Rs. 300 (Rupees three hundred).

W.P. No. 4636 of 1978 dismissed; W.P. No. 545 of 1979, allowed.

S.J.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

M. Govindaswami Pillai .. *Petitioner**

v.

C. T. Balasubramania Thevar .. *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 69—Refund of half court-fee paid on the plaint, when can be ordered—Money suit—Written statement filed—Issues framed—Date fixed for trial — Suit opened and two documents marked—Suit adjourned—Suit reported settled on next hearing date—Plaintiff however absent on the date of hearing—Suit dismissed for default, but subsequently restored—Plaintiff's counsel endorsing on the plaint that the matter was settled out of Court—Prayer for refund of half the Court-fees whether tenable.

Held: There cannot be one rule in respect of matters where an *ex parte* decree is set aside and another rule in respect of a suit dismissed for default and once again restored to the file. Just as in the former case the prior proceedings become *non est,* likewise in the latter case the proceedings prior to restoration to the file become *non est.* [*Para.* 7.]

There was no recording of evidence in the instant case after the suit was restored to file and the evidence recorded before the dismissal of the suit and its restoration becomes *non est.* Since before the recording of evidence the suit had been settled out of Court, in the *de novo* proceedings after the suit was restored to file, the plaintiff was entitled to refund of half the court-fees. Hence the order of the Subordinate Judge rejecting the claim is liable to be set aside and the plaintiff is declared to be entitled to refund of half the court-fees paid on the plaint. [*Para.* 8.]

Cases referred to:—

Ratnaswamy & Bros. v. *Subbuswamy,* (1967) 1 M.L.J. 4: 78 L.W. 752: I.L.R. (1966)

*C.R.P. No. 1372 of 1980.
31st August, 1981.

2 Mad. 308: A.I.R. 1967 Mad. 180; *Easwaramoorthy* v. *Ramakrishna,* (1974) 2 M.L.J. 137; *Mani* v. *Velayudham Chettiar,* (1979) 2 M.L.J. 86.

Petition under section 115 of Act, V of 1908, praying the High Court to revise the decree of the Court. of the Subordinate Judge, Nagapattinam, dated 7th December, 1979 and passed in O.S. No. 70 of 1978.

V. Rajanarayanan, for *R. Krishnamoorthy, R. Muthukumaraswamy, V. Ramajagadeesan* and *S. Ramalingam,* for Petitioner.

The Court made the following

ORDER.—This civil revision petition arises out of the order of the Subordinate Judge of Nagapattinam, passed in O.S. No. 70 of 1978 negativing the claim of the plaintiff in the suit for the refund of one half of the court-fees paid in the plaint under section 69 of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 (hereinafter referred to as the Act).

2. The civil revision petitioner herein filed a suit O.S. No. 70 of 1978 on the file of the Subordinate Judge of Nagapattinam, against one C. T. Balasubramania Thevar, claiming a sum of Rs. 29,238. The defendant in the written statement alleged discharge of part of the suit claim by payment and part of the claim by supplying electrical goods. After framing issues, the suit was posted in the list for trial on 16th August, 1979 and on that day the suit was opened and Exhibits A-1 and A-2 were filed by consent on the side of the plaintiff. The suit stood adjourned to 13th August, 1979 for further evidence and it was adjourned several times thereafter. When the case was taken up on 7th September, 1979, it was reported that the matter was being settled and was again adjourned to 11th September, 1979 and 12th September, 1979 as the plaintiff was absent. Subsequently on an application, the order of dismissal was set aside on 11th October, 1979 and the suit was again taken up for trial. On 22nd October, 1979, the plaintiff's counsel made an endorsement on the plaint stating that the matter is settled out of Court and the suit may be dismissed as settled out of Court and prayed for refund of half the court-fees. The learned Subordinate Judge held that in view of the fact that the suit was opened and Exhibits A-1 and A-2 were marked by consent on the side of the plaintiff, the plaintiff is not entitled to the relief prayed for. As against the order of the Subordinate Judge refusing to pass an order of refund of half of the court-fee, this civil revision petition is filed.

3. Mr. V. Rajanarayanan, representing Mr. R. Krishnamoorthy, counsel for the civil revision petitioner, submits that Exhibits A-1 and A-2 were marked previously and the suit itself was dismissed after the Exhibits were marked and when the suit is restored to file, the previous marking of Exhibits becomes *non est* and as such there is no bar for refund of half the court-fees. The question for determination in the civil revision petition is whether the marking of the documents Exhibits A-1 and A-2 will cease to have effect in view of the dismissal of the suit, and whether after the suit is restored to file, the plaintiff is entitled to refund of half the Court-fees on the ground the suit claim is settled out of Court.

4. Section 69 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955 reads as follows:—

> "Whenever any suit is dismissed as settled out of Court before any evidence has been recorded on the merits of the claim, half the amount of all fees paid in respect of the claim or claims in the suit shall be ordered by the Court to be refunded to the parties by whom the same have been respectively paid.
>
> *Explanation.*—The expression 'merits of the claim' shall have the meaning assigned to it in section 12."

The "merits of the claim" is defined in *Explanation* to section 12 of the abovesaid Act as follows:—

> "In this section, the expression 'merits of the claim' refers to matters which arise for determination in the suit, not being matters relating to the frame of the suit, mis-joinder of parties and causes of action, the jurisdiction of the Court to entertain or try the suit or the fee payable but inclusive of matters arising on pleas of *res judicata,* limitation and the like."

The section provides for refund of half the court-fees in cases the suit is dismissed as settled out of Court before any evidence has been

recorded on the 'merits of the claim'. Recording of evidence on the "merits of the claim" has been construed in several decisions of this Court as well as other High Courts. In the case reported in *Ratnaswamy & Brothers* v. *Subbuswamy*[1], Natesan, J., had an occasion to consider whether marking of two exhibits in a suit, without letting in oral evidence, will amount to recording of evidence. In that case, two exhibits were marked as evidence in the suit. But before any oral evidence was recorded in the suit, it was reported as settled out of Court and was dismissed. The trial Court rejected the application for refund of half the Court-fee paid on the plaint under section 69 of the Act. In revision, this Court held according to section 69, even marking of Exhibits will amount to recording of evidence on the merits of the claim and the party would not be entitled to benefits of section 59. The record generally means an official written report of public proceedings, as of a legislature or Court of law. Evidence in a case can both be oral and documentary and instances were not infrequent, where cases were disposed of purely on documentary evidence at times massive. The word recorded with reference to documentary evidence alone would be clear if the marginal heading of Order 13, rule 7, Civil Procedure Code, was referred to, which speaks of recording of admitted and return of rejected documents. Documentary evidence also formed part of the record of the case, and therefore, got recorded like oral evidence. Holding that marking of exhibits will amount to recording of evidence, Natesan, J., rejected the claim of the plaintiff for refund of half the court-fees. But in this case, the facts are different since after the marking of Exhibits A-1 and A-2, the suit was dismissed for default and once again restored to file on the application by the plaintiff. We have to consider whether the recording of the evidence by marking Exhibits A-1 and A-2 will continue to exist even after the suit is dismissed for default and once again restored to file. No decision pertaining to this question had been brought to by notice.

5. In the case reported in *Easwaramoorthy* v. *Ramakrishnan*[2], the effect of *ex parte* evidence recorded in a case before the *ex parte* decree is set aside is considered by N. S. Ramaswami, J. The suit was decreed *ex parte* after recording *ex parte* evidence. The *ex parte* decree was set aside on the defendant filing an application and ultimately the matter was settled out of Court and the suit was dismissed accordingly. When the plaintiff applied for refund of half the Court-fees under section 69 of the Act, the trial Court held that the plaintiff is not entitled to refund of half the Court-fees since *ex parte* evidence has been recorded. In revision, this Court held the effect of the order setting aside the *ex parte* decree is that all proceedings subsequent to the stage of the defendant's non-appearance would no longer bind him. In other words, as the defendant's non-appearance was condoned by the setting aside of the *ex parte* decree, the evidence which was recorded in his absence will not also be admissible against him. Technically, no doubt, the suit is regarded as the same though the *ex parte* decree might be set aside. But in substance the proceedings are different when they recommence after the setting aside of *ex parte* decree. Taking this view, this Court held that the plaintiff is entitled to refund of half the Court-fees under section 69 of the Act.

6. In the case reported in *Mani* v. *Velayudham Chettiar*[1], a similar question arose before this Court. The plaintiff obtained an *ex parte* decree and filed execution proceedings. However, the *ex parte* decree was later set aside. After setting aside the *ex parte* decree, when the case came up for hearing the suit was dismissed as settled out of Court. The claim for refund of half the court-fees under section 69 of the Court-Fees and Suits Valuation Act was rejected by the trial Court on the ground that there has been a recovery of a sum of Rs. 19,855 in execution. On revision, Sethuraman, J., held following the decision of N. S. Ramaswami, J., in *Easwaramoorthy* v. *Ramakrishnan*[2], that on account of the setting aside of the *ex parte* decree, the *ex parte* evidence should be treated as *non est*. If the *ex parte* decree is set aside, the parties would be in the same position as they were before recording of *ex parte* evidence. If the suit is

1. I.L.R. (1966) 2 Mad. 308: (1967) 1 M.L.J. 4: 78 L.W. 752: A. I. R. 1967 Mad. 180.
2. (1974) 2 M.L.J. 137.

1. (1979) 2 M.L.J. 86.
2. (1974) 2 M.L.J. 137.

settled out of Court after the *ex parte* decree is set aside, such settlement is clearly before any evidence has been recorded, for, the *ex parte* evidence originally recorded had been wiped out, on setting aside the *ex parte* decree. As a result of the setting aside of the decree, realisation in execution would lose its validity. If necessary, the petitioner might have been ordered to bring back the said amount to the credit of the suit as there can be no realisation in execution of a decree, which had ceased to exist. The fact that there has been execution of the decree would be of no consequence and after the decree was set aside, the parties would be restored to the position which they occupied prior to the passing of the decree. In this view, the revision was allowed and the plaintiff was found to be entitled to an order of refund of one-half of the court-fees.

7. Now, we have to consider whether in a case where some evidence is recorded and then the suit is dismissed for default, and then restored, the evidence recorded becomes *non est,* just as the *ex parte* evidence is held to be *non est* after the *ex parte* decree is set aside. In my view there cannot be one rule in respect of matters where an *ex parte* decree is set aside and another rule in respect of a suit dismissed for default and once again restored to file. Just as in the case of setting aside the *ex parte* decree, the prior proceedings becomes *non est* similarly when a suit is dismissed for default and once again restored to file, the proceedings prior to the restoration also become *non est*. Considered in this view, in this case the documents Exhibits A-1 and A-2 were marked and subsequently the suit was dismissed for default. Afterwards on the restoration of the suit to file, the marking of Exhibits A-1 and A-2 cannot be said to continue since though the suit technically remains the same, proceedings have started *de novo*. The marking of Exhibits A-1 and A-2, will not survive after restoration of the suit. After the suit was dismissed for default, the plaintiff could have as well obtained the return of the documents even prior to the restoration of the suit and hence it cannot be said that the marking of Exhibits A-1 and A-2 will continue even after the suit is restored to file. The fact that the documents were marked by consent prior to the dismissal of the suit will not in any way alter the situation.

8. I am of the view that the principles laid down in the aforesaid two decisions in *Easwaramoorthy* v. *Ramakrishnan*[1] and in *Mani* v. *Velayudam Chettiar*[2], may as well be applied to the facts of this case also. The view of the learned Subordinate Judge that the marking of Exhibits A-1 and A-2 in proceedings prior to the restoration of the suit will amount to recording of evidence after the suit is restored to file does not appear to be correct. There is no recording of evidence after the suit is restored to file and the evidence recorded before the dismissal and the restoration of the suit to file becomes *non est*. Since before the recording of evidence the suit is settled out of Court, in the *de novo* proceedings after the suit is restored to file, the plaintiff is entitled to refund of half the Court-fees. Hence the order of the Subordinate Judge is set aside and this civil revision petition is allowed and the plaintiff is declared to be entitled to refund of half the court-fees paid on the plaint.

R.S. — *Civil revision petition allowed.*

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1. (1974) 2 M.L.J. 137.
2. (1979) 2 M.L.J. 86.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

K. Rengaswamy Naidu .. *Petitioner**

v.

The Tamil Nadu Handloom Weavers Co-operative Society Limited, through the Marketing Officer, 30-A and 31, Navabthakana Street, Madurai .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *section* 10 (3) (a) (iii) *—Non-residential building in occupation of Co-optex Sales Emporium — Application by landlord for eviction—Allegation of requirement of landlord for running a hotel business —Landlord conducting hotel business in another rented building had vacated the same — On the date of the application for eviction, landlord not carrying on hotel business—Petition for eviction not maintainable.*

Held, that the requirement of section 10 (3) (*a*) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, that the landlord should be actually carrying on the business is not satisfied in this case and the appellate Court acted rightly in allowing the appeal and dismissing the rent control application.

[*Para.* 6.]

Case referred to:—

Ltd., (1959) 2 M.L.J. 215: 1959 M.W.N. 547.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), praying the High Court to revise the order of the Court of the Subordinate Judge, Ramanathapram at Madurai dated 13th February, 1979, and made in C.M.A. No. 97 of 1978 (H.R.C.C. No. 5 of 1978, Rent Controller, Sattur).

M. Veluswami, for Petitioner.

K. Ramamoorthy, for Respondent.

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*C.R.P. No. 860 of 1979.

8th September, 1981.

The Court made the following

ORDER.—The civil revision petitioner before this Court is a landlord in respect of non-residential building bearing Door No. 18, Main Road, Sattur, Ramanathapuram District. The respondent herein had been a tenant in the said building, under the civil revision petitioner, on a monthly rent of Rs. 135 and the building is being occupied by the Co-optex Sales Emporium. The civil revision petitioner filed an application in H.R.C.C. No. 5 of 1978 on the file of the Rent Controller, Sattur for eviction of the respondent herein, on the ground that he required the premises for his own hotel business. The case of the civil revision petitioner before the House Rent Controller is that himself and his son had been running a hotel business in a rented building bearing Door No. 255, Trunk Road, Sattur, belonging to Krishnaswamy Naicker, son of Guruswami Naicker. The said Krishnaswamy Naicker had been pressing the tenant, the civil revision petitioner herein to vacate the aforesaid building. He also started legal proceedings and under a compromise entered into between the said Krishnaswamy Naicker and the civil revision petitioner herein under a document dated 13th March, 1977, the civil revision petitioner herein was bound to vacate the building and he accordingly vacated the premises as per the possession receipt Exhibit A-4. The civil revision petitioner had been conducting the hotel business for the past more than 50 years and he cannot afford to close down his business. He has no other non-residential building of his own. Hence his requirement is genuine and is *bona fide.* The civil revision petitioner sent a notice to the respondent on 5th December, 1977, marked as Exhibit A-5, terminating the tenancy with the last day of December, 1977, and calling upon him to deliver vacant possession to the civil revision petitioner. The respondent did not comply with the notice and sent a reply raising false allegations.

2. The case of the respondent, the tenant in respect of the petition mentioned premises, before the House Rent Controller is that the petition is not in proper form and the material particulars required under the Tamil Nadu Buildings (Lease and Rent Control) Act, and the Rules are not furnished. The lease was entered into on 10th January, 1972, and the

possession was handed over to the Junior Marketing Officer, Regional Office, Madurai, and hence the Special Officer, Tamil Nadu Handloom Weavers' Society, Madras is not a tenant under the civil revision petitioner. After a lapse of two years from the commencement of the tenancy, the civil revision petitioner on 25th January, 1974, marked as Exhibit B-6 demanded an enhanced rent of Rs. 200 per month to which the Junior Marketing Officer replied that it is not possible to pay any enhanced rent. Subsequently also the civil revision petitioner sent letters demanding enhanced rent. On 23rd September, 1977, the civil revision petitioner sent another letter marked as Exhibit B-17 to the Marketing Officer, Madurai, demanding an enhanced rent of Rs. 250. But strange enough the civil revision petitioner had sent a lawyer's notice on 5th December, 1977, marked as Exhibit A-5 stating that he requires the premises for his own use and occupation. The respondent herein sent a reply on 28th December, 1977, marked as Exhibit A-7. It is also the case of the respondent herein before the House Rent Controller that the petition mentioned building is not suitable for running the hotel business since there is no kitchen, water-supply and other necessary amenities, which are necessary for running the hotel business and the civil revision petitioner owns other buildings also and hence the requirement of the building by the landlord is not *bona fide*.

3. The learned Rent Controller on a consideration of the evidence in the case came to the conclusion that the landlord made out a case and allowed the application for reviction. As against the said order, the tenant, respondent herein filed an appeal before the appellate authority and the Subordinate Judge of Ramanathapuram at Madurai in C.M.A. No. 97 of 1978. The appellate authority holding that for the purpose of invoking section 10 (3) (*a*) (*iii*) the landlord should prove that he is actually carrying on the hotel business and the evidence in this case showed that the civil revision petitioner could not have carried on the business on the date of the petition as claimed by him and as such the civil revision petitioner is not entitled to an order of eviction under section 10 (3) (*a*) (*iii*). As against the said order this civil revision petition has been filed.

4. It is urged on behalf of the civil revision petitioner that the fact that the landlord has continued the hotel business for the past 50 years is not challenged by the tenant. The fact that he was conducting the hotel business in the premises of one Krishnaswamy Naicker is also not disputed and that he had to vacate the same at his instance is also not seriously challenged by the respondent therein. The case of the civil revision petitioner is that inasmuch as he had been conducting the hotel business and since he had vacated the premises in which he had conducted the hotel business and since he is not in possession of any non-residential building of his own he is entitled to evict the tenant, the respondent herein, under section 10 (3) (*a*) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act. Section 10 (3) (*a*) (*iii*) reads as follows:—

> "The landlord may, subject to provisions of clause (*d*) apply to the Controller for an order directing the tenant to put the landlord in possession of the building.........
> (*iii*) in case it is any other non-residential building, if the landlord or (any member of his family) is not occupying for the purpose of a business which he or (any member of his family) is carrying on, a non-residential building in the city, town or village concerned which is his own".

As per the section the landlord must be carrying on the business at the time of his claim for eviction so as to enable him to put forward a claim under section 10 (3) (*a*) (*iii*). In the case reported in *T. K. Krishna Iyer* v. *Karur Vysia Bank Limited, Coimbatore*[1], the civil revision petitioner was conducting a coffee hotel business in a rented premises in the name and style of "Ranjitha Vilas". After he found that he could not acquire possession of the building in which he was conducting the business he entered into a family settlement with his brother and his son under which the business became the exclusive property of the brother and the son. By reason of the settlement the landlord ceased to have any interest in the business, as effectively as if the business has been sold away in Court-

1. (1959) 2 M.L.J. 215: 1959 M.W.N. 547.

auction in execution of a decree which some creditor had obtained against the landlord. After the landlord ceased to have any interest in the business he desired to start a business of his own as a coffee hotel proprietor. He had been a coffee hotel proprietor all his life and had the skill and experience needed for starting and conducting such business. He subsequently purchased a building with a view to conduct in it the business known as "Ranjitha Vilas". Since that business had ceased to be his and since he desired to start a new business of the same kind, he claimed possession of the building from the tenant occupying the building he had purchased. On these facts Subrahmanyam, J., held that in view of the phrase used *viz.*, "a business which he is carrying on" in section 7 (3) (*a*) (*iii*), the section would apply only to cases where a person is conducting a business in a building which is not his and which he is bound to vacate under an order or decree of a civil Court or any other authority. Since the landlord who claimed that he required the premises for his own business had not done any act in the way of carrying on or preparing for carrying on a business as hotel proprietor on the date on which he filed the application, the landlord was held to be not entitled to an order of eviction. Even though he wanted to become a hotel proprietor again it would not render him on the date on which he made the application a person who was carrying on a business as hotel proprietor. He was on that date a person who had done business in the past as a hotel proprietor and who was intending to do business in the future as hotel proprietor. Such a person cannot be said to be a person who is carrying on a business. To hold otherwise would be to delete from section 7 (3) (*a*) (*iii*) the words "which he is carrying on", a function which the Court is powerless to perform. With these observations the learned single Judge held that the landlord is not entitled to evict the tenant from the premises the landlord had purchased.

5. The facts of the above case are similar to the case under revision. Here also the landlord who was conducting a business as a hotel keeper had put an end to his business and delivered the entire hotel business as a going concern to his landlord Krishnaswamy Naicker as per Exhibit A-4. On a reading of Exhibit A-4 it shows that the entire business was handed over to Krishnaswamy Naicker on 14th June, 1978. After transferring the entire business to Krishnaswamy Naicker, the landlord had not done anything by which it can be said that he is carrying on the hotel business. In his evidence before the Rent Controller as P.W. 2 the landlord who is the civil revision petitioner herein had not spoken to anything from which the landlord's carrying on a hotel business can be inferred. No doubt the civil revision petitioner had a rich previous experience in running the hotel but that will not help him in any way in getting the tenant evicted. Subrahmanyam, J., in *T. K. Krishna Iyer* v. *Karur Vysia Bank Limited, Coimbatore*[1], observed as follows:—

> "It is true that the avocation of hotel proprietor was with him an old avocation and that nothing more was natural than that he should want to become a hotel proprietor again. But that would not render his on the date on which he made the application a person who was carrying on business as a hotel proprietor".

6. On the same reasoning the civil revision petitioner herein cannot be said to be carrying on a hotel business for which he needed the premises. Since the requirement of the section 10 (3) (*a*) (*iii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, that the landlord should be actually carrying on the business is not complied with in this case the appellate Court acted rightly in allowing the appeal and dismissing the rent control application.

7. There are no merits in this civil revision petition and the same is dismissed.

8. There well be no order as to costs.

R.S. ——— *Petition dismissed.*

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1. (1959) 2 M.L.J. 215: 1959 M.W.N. 547.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Nainar Sundaram, J.*

K. P. Ayyeemuthuswami Gounder .. *Petitioner**

v.

The Land Commissioner, Board of Revenue, Land Reforms, Madras and another .. *Respondents.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 82—Suo motu *powers—Not intended to be exercised unreasonably and unfairly.*

The compensation for the surplus lands acquired had been determined and disbursed. The surplus lands had also been assigned and the value of the lands so assigned had been determined. While so, after the lapse of four years the first respondent—Board of Revenue in exercise of *suo motu* powers under section 82 of Act LVIII of 1961 passed an order concluding that compensation payable for the lands acquired is nil and directing consequential action. The impugned order was challenged as illegal in writ proceedings.

Held, the *suo motu* power of revision in respect of orders passed under section 50 (5) of the Tamil Nadu Act LVIII of 1961 is not intended to be exercised arbitrarily without taking note of the consequences, which have followed pursuant to orders already passed under the Act. In the instant case, the authorities were declaring nil compensation for the lands acquired under the Act and at the same time, they had already determined and were reaping the benefit of the value for the same lands assigned to third parties. Practically this would amount to unjust enrichment by the State at the expense of a citizen like the petitioner. The *suo motu* powers of revision under section 82 of the Act reserved for the first respondent are not intended to be exercised to lead to the above result. Any power vested with a public authority is not intended to be exercised unreasonably and unfairly. Any element of caprice or arbitrariness in the exercise of such power cannot be tolerated by Courts when it is brought to their notice by citizens who are put to prejudice and loss by such exercise of power. This compels the interference in writ proceedings. [*Para.* 3.]

K. Srinivasan and *K. Raghunathan*, for Petitioner.

The Government Pleader, for Respondents.

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*W. P. No. 4012 of 1979, 8th December, 1981.

The Court made the following

ORDER.—The petitioner is the owner of the lands declared as surplus under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), hereinafter referred to as the Act. All the proceedings under the Act have been completed. The draft assessment roll under section 50 (3) of the Act was published on 10th July, 1974 and the final assessment roll was also published on 2nd October, 1974. The amount payable for the lands acquired was determined at Rs. 6,916. The said amount has also been disbursed. The surplus lands have also been assigned to third parties and the value for the lands so assigned has also been determined on the basis of the determination of the amount payable for the lands acquired. While so, after the lapse of practically four years, the first respondent purported to exercise *suo motu* powers of revision under section 82 of the Act in respect of the draft assessment roll and by the impugned order dated 30th November, 1978, came to the conclusion that the amount payable for the lands acquired is nil and directed the second respondent to amend the final assessment roll.

2. In challenging the order passed by the first respondent dated 30th November, 1978, Mr. K. Srinivasan learned counsel for the petitioner submits that the amount payable for the lands acquired as surplus under the Act was determined, adopting the formula set out in Schedule III of the Act and on the same basis, the value for the lands assigned was also 'determined and it is open to the authorities under the Act to take away the lands of the petitioner under the Act without paying any compensation and at the same time assign the same lands, getting appropriate value for the same under the provisions of the Act.

3. The first respondent has chosen to revise the determination of the amount payable for the lands acquired on the ground that the lands were lying waste and they were not under actual cultivation and hence there is no possibility of working out the normal gross produce with reference to which the fair rent could be calculated. Earlier, the amount payable for the lands acquired as surplus was determined, may be, taking into account the potentialities of the lands for yielding crops, if cultivated. Earlier determination enured to the benefit of the petitioner and he had no occasion to object to it. Now, the first respondent wants to adopt a different norm, to say that if the lands were not under actual cultivation, there was no

scope for working out the normal gross produce and the fair rent. At this point of time, it is not possible for the petitioner to demonstrate the factual position one way or the other and repel the reasoning of the first respondent either on principle or on facts. It is too late in the day for the first respondent to adopt this reasoning to reopen the matter which got concluded practically four years back. The amount for the lands acquired has got to be determined as per the formula set out in Schedule III to the Act. The same formula has got to be adopted for fixing the value of the lands for the purpose of assignment of the same to third parties. It is not disputed before me that adopting the same formula as was done with reference to the draft and final assessment rolls, the value for lands assigned has been determined and the assignees were bound to pay the same. It is not the case of the respondents that there is a proposal to revise the value of the lands assigned on the basis that no amount is payable for the lands acquired. It is true that the first respondent can exercise *suo motu* powers of revision in respect of orders passed under section 50 (5) of the Act. This is permissible under section 82 of the Act. But, this power is not intended to be exercised arbitrarily without taking note of the consequences, which have followed pursuant to orders already passed under the Act. In the instant case, the authorities are declaring nil compensation for the lands acquired under the Act and at the same time they have already determined and are reaping the benefit of the value for the same lands assigned to third parties. Practically this would amount to unjust enrichment by the State at the expense of a citizen like the petitioner. In my view, the *suo motu* powers of revision under section 82 of the Act reserved for the first respondent are not intended to be exercised to lead to the above result. Any power vested with a public authority is not intended to be exercised unreasonably and unfairly. Any element of caprice or arbitrariness in the exercise of such power cannot be tolerated by Courts when it is brought to their notice by citizens who are put to prejudice and loss by such exercise of power. In this view, I feel obliged to take cognizance of the grievance expressed by the petitioner with regard to the order passed by the first respondent. This compels me to interfere in writ proceedings. Accordingly, the writ petition is allowed. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATUR AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

T. Shanmugham ... *Petitioner*

v.

The Executive Officer, Sri Kailasanatha swami Sri Nithyakalyana Peruma Devasthanam, Karaikal ... *Responden*

Pondicherry Buildings (Lease and Ren Control) Amendment) Act (VIII of 1980) section 23 (1) — Petition for evictio against tenant on the ground of wilfu default in payment of rent — Evictio ordered by the Rent Controller— Appea by tenant to Subordinate Judge as Appel late Authority — Whether maintainable

Held, that after the Pondicherry Building (Lease and Rent Control) Act was amended, it was incumbent on the part of the revision-petitioner to move the District Cour to withdraw the appeal pending on the file of the Sub-Court to its own file and dispose of the same, or move the Sub-Court to transfer the case to the file of the District Court It was the revision-petitioner himself who chose to file, or at least continue the appeal In a wrong forum and it is not now open to him to rely on his own lapses and laches to contend that the order is *non est* and, therefore, he is entitled to file a revision against the same. If the order of the Appellate Authority is treated as *non est* or passed without jurisdiction, then, the order of the learned Rent Controller will stand and, therefore, the revision-petitioner is liable to be evicted, as he deserves to be. [*Para. 2.*]

Petition under section 25 of the Pondicherry Buildings (Lease and Rent Control) (Amendment) Act, 1980, praying the High Court to revise the order of the Court of the Appellate Authority (Subordinate Judge), Karaikal dated 11th August, 1981 and made in C.M. A. No. 3 of 1981 (H. R. C. O. P. No. 1 of 1980), Rent Controller, Karaikal.

R. Tirugnanam, for Petitioner.

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*C. R. P. No. 2918 of 1981. 9th September, 1981.

The Court made the following

ORDER. —This is a civil revision petition against an order of the Appellate Authority, confirming an order of the learned Rent Controller, Karaikal, evicting the revision-petitioner, who is in occupation of the premises belonging to Sri Kailasanathaswami Sri Nithyakalyana Perumal Devasthanam, as a tenant on a monthly rent of Rs. 5/- per month after depositing a sum of Rs. 4,000 which is liable to be refunded at the time when he vacates the premises. He did not pay the rent for the period from October, 1973 to September, 1979. The arrears amounted to Rs. 355-75. Repeated demands for payment of arrears of rent by the landlord, *viz.*, the Executive Officer of the aforesaid Devasthanam, were not complied with by the tenant and, therefore, the petition was filed for eviction. The tenant contended that he has spent about Rs. 287 and odd to carry out repairs and Rs. 500 to instal electric fitting in the building with the consent of the landlord and that he is entitled to adjust this amount. The learned Rent Controller rejected this contention of the tenant and found that he has committed wilful default and directed his eviction. An appeal was preferred before the learned Subordinate Judge, as the Appellate Authority and was dismissed by him.

2. The contention of the tenant now is that he is entitled to adjust the aforesaid amounts spent by him in order to effect repairs to the house and instal electric fittings. This contention is not open to him because there is no such agreement in writing. It is contended by the learned counsel for the tenant that the Appellate Authority has no jurisdiction to dispose of the appeal in view of the provisions of section 17 of the Pondicherry Buildings (Lease and Rent Control) (Amendment) Act, 1980, by which section 23 of the principal Act was amended, substituting for sub-section (1) of section 23 of the principal Act, the following sub-section, *viz.*:—

"(1) Any person aggrieved by an order passed by the Controller may, within 15 days from the date of such order, excluding the time taken to obtain a certified copy of the order, file an appeal in writing to the District Court.

(2) In sub-sections (2) and (3), for the words 'appellate authority' wherever it occurs, the words 'District Court' shall be substituted."

After the Act was amended as aforesaid, it was incumbent on the part of the revision-petitioner to more the District Court to withdraw the appeal pending on the file of the Sub-Court to its own file and dispose of the same, or move the Sub-Court to transfer the case to the file of the District Court. It was the revision petitioner himself who chose to file, or at least continue the appeal in a wrong forum and it is not now open to him to rely on his own lapses and laches to contend that the order is *non est* and, therefore he is entitled to file a revision against the same. If the order of the Appellate Authority is treated as *non est* or passed without jurisdiction, then, the order of the learned Rent Controller will stand and, therefore, the revision-petitioner is liable to be evicted, as he deserves to be. Consequently, the Civil Revision Petition is dismissed.

R.S. ——— *Civil revision petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. N. Singaravelu, J.*

S. Srinivasaraghavan .. *Petitioner* *

v.

Thiru Muthukaruppa Muthiriar .. *Respondent.*

Tamil Nadu Cultivating Tenants' (Protection from Eviction) Act (XXXVI of 1956), section 7—Petition for restoration of possession by tenant—Petition filed out of time—Power of revenue Court to condone delay.

The law is that the delay of each day should be explained, though the civil Courts take a rather liberal view of the matter depending on the circumstances of each case. In the instant case, no sufficient cause was shown for the long delay and

*C.R.P. No. 1529 of 1979. 21*st October,* 1981.

the ground alleged is also hollow and puerile. In matters where special rights are given to parties under special enactments, a judicial [body or any quasi-judicial authority should not be over-indulgent or lightly interfere with the rights of the parties which deprive them of the valuable rights of limitation. The Revenue Court has erred in condoning the delay without sufficient grounds. [*Para. 4.*]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Special Deputy Collector (Revenue Court), Tiruchirapalli, dated 31st March, 1979 and made in M. P. No. 157 of 1978.

S. Sampathkumar, for Petitioner.

E. Padmanabhan, for Respondent.

The Court made the following

ORDER. — This is a petition by the landlord against the order of the revenue Court condoning the delay in filing the application for restoration of possession under the provisions of the Tamil Nadu Cultivating Tenants' (Protection from Eviction) Act XXXVI of 1976.

2. The facts of the application are briefly these : The revision petitioner was the landlord and respondent herein was originally his tenant in respect of 1·56 acres of the land in Esaneikorari Village in Lalgudi Taluk. It is common ground that the landlord filed an application for eviction of the tenant on the ground of non-payment of arrears of rent and an order of eviction was passed after giving sufficient opportunity to the tenant. It would appear that the landlord executed the order of eviction and took delivery through Court. Later, the tenant seems to have meddled with the possession and the landlord field a suit in O. S. No. 645 of 1976 on the file of the District Munsif's Court, Tiruchirapalli, for permanant injunction and obtained a decree restraining the tenant from interfering with the possession of the landlord. Meanwhile, Act XXXVI of 1976 came into force under which the evicted tenants were given rights in the property enabling them to recover possession. Section 7 of the Act XXXVI of 1976 says that an application for restoration of possession must be made within three months. The tenant kept quiet and filed an application out of time with a petition to condone the delay. The landlord opposed the application, but the revenue Court condoned the delay and ordered further enquiry. The landlord is aggrieved wilh the order and has come on revision.

3. Normally, in a case of this kind, this Court will not interfere in revision especially when the lower Court has passed an order of condonation of delay in admitting an application. But in the instant case, the Revenue Court has taken very many things for granted and its conclusion is not supported by evidence. No doubt, there is provision in the Act XXXVI of 1976 under which the revenue Court is empowered to receive application even after the prescribed time, if sufficient cause is shown. This is a special enactment giving special rights to a certain class of persons and therefore the provisions must be strictly construed. According to the respondent/tenant, he was prevented from filing this application in time, since the landlord offered to settle the matter with him and therefore the tenant was involved into a state of inaction. The second ground urged on behalf of the tenant was that his lawyer was indisposed and therefore he could not file an application in time. Regarding the first ground that it was the landlord who was responsible for the inaction of the tenant, it is *prima facie* unacceptable. The revision petitioner who is the landlord had obtained an order of eviction and also taken possession through Court. There was no ostensible need for him to compromise the matter with the tenant after taking delivery. Therefore it is; tenant was obliged to put forward a plea that it was only a paper delivery and not actual delivery. This story of paper delivery should not be readily accepted without proper and rigid proof, since all official acts must be presumed to be done in the normal course and they assume regularity. This story of paper delivery is very freely introduced by the defeated parties as a last resort and therefore it should be scrutinised with care and caution. So far as this case is concerned, if the tenant continued to be in possession of the property even after the alleged delivery, there was no need for him for filing an application for restoration of possession which itself presupposes effective delivery. In the face of official records recording delivery the

plea that the landlord wasted to compromise with the tenant is not at all acceptable. I wonder what is there for compromise.

4. Again, the next ground that the lawyer of the tenant was indisposed has no factual foundation. The said lawyer was not examined nor has he filed an affidavit to that effect. In any event, this ground has not been satisfactorily proved at all. There is one other important factor which the revenue Court has lost sight of. The landlord has filed a suit in a civil Court and obtained a decree for injunction against the tenant restraining his from interfering with the possession of the landlord. The tenant remained *ex parte* and it was an *ex parte* decree. The very fact the landlord filed a suit and obtained a decree for injunction shows that there was no scope for compromise between the parties and that the alleged promise of compromise is only imaginary. Even when the decree was brought to the notice of the revenue Court, it ignored the decree of the civil Court and condoned the delay for the mere asking of it. Strictly speaking, the law is that the delay of each day should be explained, though the civil Courts take a rather liberal view of the matter depending on the circumstances of each case. In the instant case, no sufficient cause was shown for the long delay and the ground alleged is also hollow and puerile. As already stated. in matters where special rights are given to parties under Special enactments, judicial body or any quasi—judicial authority should not be over-indulgent or lightly interfere with the rights of parties which deprive them of the valuable rights of limitation. For all these reasons, I am satisfied that the revenue Court has erred in condoning the delay without sufficient ground. In the result the revision petition is allowed and the order of the revenue Court is set aside. There will be no order as to costs.

R. S. — *Petition allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. R. Gokulakrishnan, O. CJ. P. Venugopal and V. Ratnam, JJ.*

In the matter of the Document dated 26th June, 1975 executed by Tvl. Indian Cables and Wire Industries and others and referred under section 57 of the Indian Stamp Act, 1899.

The Chief Controlling Revenue Authority, Board of Revenue, Madras .. *Petitioner**

v.

Tvl. Inca Cables (Private) Limited, 13, I Main Road, C.I.T. Colony, Madras-4 ... *Respondent.*

Indian Stamp Act, (II of 1899), section 2 (10)—Deed—Construction—Release and Conveyance—Distinction—Nomenclature does not determine character—Substance must be looked into.

Reading the concerned document as a whole, it is very clear that it is not the nomenclature given to a document that determines the character of the document, but the substance of it must be looked into to decide the nature of the document. There can, of course, be no legal impediment to a party selecting and adopting a particular form of transaction to mininise the expenses of stamp duty. But what exactly is the document is the question to be decided. Considered in the light of the decisions reported in *Board of Revenue v. Lakshmanan* (A. I. R. 1970 Mad. 348 F. B.) and In the matter of *Hiralal Navalram*, (1968) I.L.R. 32 Bom. 505) it is clear that the document in question cannot by any stretch of imagination be a release deed and it can only be a conveyance within the meaning of section 2 (10) of the Indian Stamp Act and, as such, stamp duty has to be levied under Article 23 of Schedule I to the Stamp Act. [*Para. 3.*]

Cases referred to:—

Board of Revenue v. *Lakshmanan*, (1970) 2 M.L.J. 326: 83 L.W. 205: A.I.R. 1970 Mad. 348; *Kuppuswami* v. *Arumugham*, (1967) 2 S.C.J. 5: (1967) 2 M.L.J. (S.C.) 29: (1967) 2 An. W.R.

*R.C. No. 10 of 1980. *3rd August*, 1981.

(S.C.) 29: (1967) 1 S.C.R. 275: A.I.R. 1967 S.C. 1395; *Hutchi Gowder* v. *Bheema Gowder*, (1959) 2 M.L.J. 324: I.L.R. (1959) Mad. 552: A.I.R. 1960 Mad. 33; *S. P. Chinnathambiar* v. *Chinnathambiar*, (1953) 2 M.L.J. 387: I.L.R. (1954) Mad. 500: 66 L.W. 671: A.I.R. 1954 Mad. 5; In the matter of *Hiralal Navalram*, (1908) I.L.R. 32 Bom. 505. *Board of Revenue* v. *Narasimhan*, (1961) 2 M.L.J. 538: I.L.R. (1961) Mad. 926: 74 L.W. 432: A.I.R. 1961 Mad. 504.

Case referred to the High Court by the Chief Controlling Revenue Authority, Board of Revenue Madras, under section 57 of the Indian Stamp Act, 1899 in the matter of Instrument dated 26th June, 1975, entered into between (1) Tvl. Indian Cables Wire Industries and Tvl. Inca Cables Private Limited, regarding the duty changeable on the said instrument on his file on the following question of law namely "whether the document dated 26th June, 1975 executed by Tvl. Indian Cable and Wire Industries and others and purporting to be a release deed is just a release deed and liable to be stamped as such under Article 55 of Schedule I to the Stamp Act or is a Conveyance. Deed as defined undet section 2 (1) of the Stamp Act and, therefore, liable to be stamped as such under Article 23 of Schedule I to the Stamp Act."

The Government Pleader, for Petitioner.

S. Adaikalam, amicus curiae, for Respondent.

The Judgment of the Court was delivered by

Gokulakrishnan, O. CJ.—This is a reference under section 57 of the Indian Stamp Act, 1899 (Central Act II of 1899). The short facts are that the Indian Cable and Wire Industries a registered partnership firm, was carrying on business with Thiru Vrajlal N. Saughvi and eight others as its partners. In pursuance of an agreement dated 12th April, 1973, between the partners of the aforesaid partnership firm it was decided to promote a Private Limited Company and to transfer and convey all the properties as well as liabilities of the partnership firm to the limited company for a consideration of Rs. 8,40,000. Accordingly, Inca Cables Private Limited was incorporated under the Companies Act on 5th May, 1973. The Limited Company offered to pay the said sum of Rs. 8,40,000 in the form of fully paid up shares. Out of 1,500 shares in its capital, the Company allotted 840 fully paid up shares to the nine partners of the partnership firm and their family members. All these nine partners took 45 shares in the capital of the company. Of the nine partners of the erstwhile partnership firm, six were appointed as first directors of the Company and one as the first chairman of the Company. By the document dated 26th June, 1975, Tvl. Indian Cable and Wire Industries represented by all their nine partners, relinquished their right and interests in the properties of the firm worth about Rs. 16,24,000 in favour of Tvl. Inca Cables Private Limited. The said document was presented for registration before the Sub-Registrar, Tambaram who felt some doubt and referred it to the District Registrar Madras (South) for instructions regarding the nature and chargeability of the document. Thereupon, the District Registrar made a reference to the Board of Revenue under section 56 (2) of the Stamp Act, and the Board of Revenue after examining the case with connected records, held the document as a deed of conveyance. Tvl. Inca Cables (P.) Ltd., preferred a petition the Board of Revenue to reconsider the matter and the said petition was dismissed on the ground that the Board had no power of review under section 56 (3) of the Indian Stamp Act. The Private Ltd. Company preferred a Writ Petition No. 1597 of 1977 on file of this Court, and this Court by judgment dated 25th July, 1979, directed the Board of Revenue to refer the matter to this Court under section 57 of the Indian Stamp Act. Hence this reference. The reference is as under:—

> "Whether the document dated 26th June, 1975, executed by Tvl. Indian Cable and Wire Industries and others and purporting to be a release deed is just a release deed and liable to be stamped as such under Article 55 of Schedule I to the Stamp Act, or is a conveyance deed as defined under section 2 (10) of the Stamp Act and therefore liable to be Stamped as such under Article 23 of Schedule I to the Stamp Act."

The document which is styled as a release deed, clearly states as follows:—

> "Whereas all the releasors have sworn to an affidavit of declaration dated 19th May, 1973, declaring the ownership of the releasee and the absence of any rights in the releasors over the said properties.

Whereas the releasee has since its incorporation been in possession and enjoyment of the said properties,

....

Whereas the releasee is thus the full and absolute owner of the said properties, and.....

Now this identure witnesseth that the releasors do hereby declare and acknowledge that the releasee is the absolute and full owner of the properties set out in the Schedule hereunder and that the releasors have no right over or interest in the said properties and even if the releasors have any right or interest, they do hereby release, relinquish and abandon the same".

2. It is clear from the deed that the Indian Cable and Wire Industries, a registered partnership firm, carrying on business at Chingleput district is releasing the properties mentioned in the Schedule to the release deed in favour of Tvl. Inca Cables (P.) Ltd. incorporated under the Companies Act, 1956, having its registered office at Chingleput district. Mr. K. Venkataswami, learned Government Pleader, submitted that there is no pre-existing right in the releasee in the properties released, and whatever may be the nomenclature given to the document, it is a conveyance and as such the document comes under the definition of section 2 (1) of the Indian Stamp Act, 1899 and therefore chargeable to duty under Article 23 of Schedule I to the Stamp Act. Section 2 (1) of the Indian Stamp Act, defines 'conveyance' as follows:—

> *Section 2 (10)*.—'Conveyance' includes a conveyance on sale and every instrument by which property, whether movable, or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I."

Article 55 of Schedule I to the Stamp Act deals with 'release'. It reads as follows:—

> "Release, that is to say, any instrument (not being such a release as is provided for by section 23-A) whereby a person renounces a claim upon another person or against any specified property.........."

Hence, according to Mr. Venkataswami, the learned Government Pleader, to bring the document within the ambit of a 'release', both the releasor and the releasee must have a pre-existing right in the property released. As far as the present case is concerned, both the releasor and the releasee are separate juristic entities, and the releasee which is a public limited company has no pre-existing right in the properties sought to be released under the deed. The learned Government Pleader cites the decision reported is *Board of Revenue* v. *Lakshmanan*[1] to which one of us was party. In this decision the Full Bench has specifically held as follows :—

> "The essential difference between a conveyance and a release lies in the fact that, in the latter, there is no transfer of an interest or right to another, who had no pre-existing right in it to any extent. A release of a right or of a claim can only be in favour of a person who had a pre-existing right or claim and by reason of the release the latter's right or claim is enlarged or is made fuller in its content. *Kuppuswami* v. *Arumugha*[2], quoting from *Hutchi Gowder* v. *Bheema Gowder*[3], and *S.P. Chinnathambiar* v. *Chinnathambiar*[4], accepted the proposition as correct that a release can only feed title, but cannot transfer title or that "renunciation must be in favour of a person, who had already title to estate, the effect of which is only to enlarge the right; renunciation does not vest in a person a title where it did not exist".

Mr. Venkataswami also cited the decision in the matter of *Hiralal Navalram*[5], wherein a Full Bench of the Bombay High Court has held that where by a document, the executing party, purporting to be entitled to a share in a going Pressing Factory, transfers absolutely the whole of that share to the other person interested in the factory in consideration of a certain sum, the document is a conveyance or sale of property. The principle of the two decisions cited supra will clearly apply to the facts of this case, and as such, we do not find any difficulty in construing the document as a conveyance.

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1. (1970) 2 M.L.J. 326 : 83 L.W. 205 : A.I.R. 1970 Mad. 348 (F.B.).
2. (1967) 2 M.L.J. (S.C.) 29 : (1967) 2 An. W.R. (S.C.) 29 : (1967) 2 S.C.J. 5 : (1967) 1 S.C.R. 275 A.I.R 1967 S.C. 1395,
3. (1959) 2 M.L.J. 324: I.L.R. (1959) Mad. 552: A.I.R. 1960 Mad. 33.
4. (1953) 2 M.L.J. 387: I.L.R. (1954) Mad. 500: 66 L.W. 671: A.I.R. 1954 Mad. 5.
5. (1908) I.L.R. 32 Bom. 505.

3. Mr. S. Adaikalam, *amicus curiae*, appearing for the respondent cites the decision reported in *Board of Revenue* v. *Narasimhan*[1], and submits that the parties have a right to select a particular form of transaction to minimise the expenses and that in the present document, it has been clearly stated that the transaction is only a release. No doubt, in this Full Bench decision, it has been stated as follows (head note):—

> "There can be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty. The Revenue authorities cannot say that the object of the transaction was to achieve a purpose not disclosed in the document and that, therefore, the document should be deemed to be that which it was not.
>
> The true scope of the rule of substance prevailing over the form with reference to a document chargeable to stamp duty is that the recitals therein should not be lost sight of merely because the parties gave a particular description of the nature of the document."

Reading as a whole, it is very clear that it is not the nomenclature that is given to a document that determines the character of the document but the substance of it must be looked into a decide the nature of the document. There can of course be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty. But what exactly is the document is the question to be decided. Considered in the light of the decisions reported in *Board of Revenue* v. *Lakshmanan*[2], and in the matter of *Hiralal Navalram*[3], it is clear that the document in question cannot by any stretch of imagination be a release deed and it is can only be a conveyance within the meaning of section 2 (10) of the Indian Stamp Act and as such stamp duty has to be levied under Article 23 of Schedule I to the Stamp Act. The reference is answered accordingly.

4. The assistance rendered by Mr. S. Adaikalam, *amicus curiae*, is recorded.

R.S. ——— *Answered accordingly.*

1. (1961) 2 M.L.J. 538: I.L.R. (1961) Mad. 926: 74 L.W. 432 : A.I.R. 1961 Mad. 504.
2. (1970) 2 M.L.J. 326: A.I.R. 1970 Mad. 348 (F.B.).
3. (1908) I.L.R. 32 Bom. 505.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— V. *Balasubrahmanyan, J.*

Madurai District Co-operative Supply and Marketing Society Limited, A. No. 1437 by its Special Officer *Appellant**

v.

S. Sankaranarayanan and others *Respondents.*

(A) *Tamil Nadu Co-operative Societies Act (LIII of* 1961), *section* 73 *read with section* 100—*Employees of District Co-operative Supply and Marketing Society charged for shortage of stock —Domestic inquiry held—Dismissal of employees —Suit in Civil Court by employees for declaration that dismissal was wrongful—If maintainable.*

(B) *Industrial Disputes Act* (1947), *section* 2-*A*.

A dispute concerning the employment or the non-employment of a workman as between the Co-operative Society and its workman must be regarded as an industrial dispute within the meaning of section 2-A of the Industrial Disputes Act, whether the non-employment can be treated as a discharge, dismissal, retrenchment or termination of employment. [*Para.* 6]

In the present case, the cause of action pleaded in the suits out of which the second appeals arise, is the dismissal of the employees concerned. It is a well-known feature of the law relating to master and servant, that an employee whose employment is wrongfully terminated can sue his employer in a civil Court. A dispute between an employer and an employee in a matter concerning the latter's dismissal must, therefore be regarded as a dispute which does not arise out of a right conferred or liability imposed for the first time by the Industrial Disputes Act. The right or liability, on the contrary, has been in existence, ever since the law relating to master and servant became part of our common law. Applying the decision of the Supreme Court in *Premier Automobiles* v. *K. S. Wadke*, (1975) 48 F.J.R. 252, the present suit filed by the employees against the Society must be held to be maintainable, and not barred by the Industrial Disputes Act. [*Para.* 9.]

The relief claimed by the workmen in their suits is not only a declaration that their

*S.A. No. 473 to 476 of 1975, 16*th June*, 1980.

dismissal from service was wrongful, but also Society from putting into effect the orders of dismissal. Under common law, a Civil Court is quite competent to give a declaratory relief to a dismissed workman as to his wrongful dismissal. The common law only withholds from the Court's powers, the power to order reinstatement of the dismissal workman in the event of its holding that the dismissal was invalid. In the instant cases no difficulty is created by the forms of relief aske dfor by the employees as against the Society. For both declaration and injunction are reliefs well within the Court's province. [*Para.* 10.]

Cases referred to:—

Krishnan v. *E.I.D.* & *S. Factories*, A.I.R. 1964 Mad. 81; *Madura Mills Co., Ltd.*, v. *Guruvammal*, (1967) 2 Lab. L.J. 397; *Premier Automobiles Ltd.* v. *K. S. Wadke*, (1975) 48 F.J.R. 252; *Bangalore Water Supply* v. *A. Rajappa*, (1978) 1 S.C.J. 481: (1978) 2 S.C.C. 213: A.I.R. 1978 S.C. 548.

Appeal against the decree of the Additional District Court, Madurai dated 28th June, 1974 and passed in Appeal Suit Nos. 398, 400, 403 of 1970 and 401 of 1970 respectively, preferred against the decree of the Court of the District Munsif, Madurai Town in Original Suit Nos. 109, 601, 650, 612 of 1968 respectively.

The Court delivered the following

JUDGMENT:—The common question in all these second appeals is whether the suits.out of which they arise, are maintainable. The Courts below held that they were maintainable. The corretness of their decision is disputed by the appellant who was the defendant in all the suits.

2. Four suits figure in this controversy. The plaintif in each suit was an employee of a Co-operative Society called the Madurai District Co-operative Supply and Marketing Society Limited. Each of them was in charge of a godown of the Society storing foodgrains. On the ground that there were shortages in the stock, each of the godown keepers was dismissed by the Society after a domestic inquiry. Each of them filed a suit against the Society for a declaration that his dismissal was wrongful.

3. The Society resisted the suits on the ground, among others that they were not maintainable. The Courts below negatived this contention, proceeded on the merits of the case and decreed the suits as prayed for.

4. The issue as to maintainability was rested before the lower Courts under two different sets of statutory provisions. One was under section 73 read with section 100 of the Tamil Nadu Co-operative Societies Act, 1961. The other was under the Industrial Disputes Act, 1947. No argument, however, was addressed before me by the Society's learned counsel on the basis of section 73 of the Tamil Nadu Co-operative Societies Act, 1961, for disputes arising out of disciplinary action taken by a Society or its Committee against a paid servant of Society stands specifically excluded from the class of disputes which are covered by the special procedure drawn up under section 73 of the Act.

5. Learned counsel for the Society accordingly pressed for my consideration the other objection to the maintainability of the suits namely that the Industrial Disputes Act provides for a comprehensive procedure and an adequate remedy for dismissed workmen, and thereby the jurisdiction of Civil Courts is impliedly barred in such matters. He relied on two decisions of learned Single Judges of this Court in *Krishnan* v. *E.I.D.* & S. *Factories*[1] and *Madura Mills Company Limited* v. *Guruvammal and another*[2] Learned counsel pointed out that these decisions were cited with approval by the Supreme Court in *Premier Automobiles Limited* v. *K.S. Wadke*[3] Learned counsel further pointed out that in a more recent decision *in Bangalore Water Supply* v. *A. Rajappa*[4] the Supreme Court had laid down that Co-operative Societies carrying on any industry, cannot fall outside the ambit of section 2 (j) of the Industrial Disputes Act. Learned counsel accordingly submitted that the courts below were in error in entertaining the suits filed by the dismissed employees and in proceeding to adjudicate them on merits.

6. I accept the submission that the appellant Society in this case might well be brought within the ambit of the Industrial Disputes Act as carrying on an 'industry' which includes any business, trade, undertaking, manufacture or calling of employers. Maintaining a godown for storage and distribution can be treated either as a business or as a trade or at any rate as an undertaking. I have also no hesitation in holding that a dispute concerning the employment or the non-employment of a workman as

1. A.I.R. 1964 Mad. 81.
2. (1967) 2 Lab. L.J. 397.
3. (1975) 48 F.J.R. 252.
4. (1978) 1 S.C.J. 481: (1978) 2 S.C.C. 213: A.I.R. 1978 S.C. 45.

between the co-operative society and its workmen must be regarded as an industrial disputer within the meaning of section 2-A of the Industrial Disputes Act, whether the non-employment can be treated as a discharge, dismissal, retrenchment or termination of employment.

7. Granting that the appellant co-operative society maintaining a godown and engaging godown keepers is an industry and granting that the dismissal of the godown keepers raises an industrial dispute, still the question is whether the suits filed by the present plaintiffs against their dismissal by the Society are not maintainable. For an answer to this question we will have to go to the decision of the Supreme Court in the *Premier Automobiles* v. *K. S. Wadke*.[1] In that case the Superme Court laid down the following, among other, propositions of law on the subject of bar of suits.

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the Civil Court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the Civil Court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular dispute.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

8. It may be observed that where the dispute does not touch any right conferred or liability imposed peculiarly by the Industrial Disputes Act itself, but arises out of a controversy regarding a right or liability under the general law or the common law, then, according to the Supreme Court, the jurisdiction of the Civil Court is not impliedly ousted, but survives as an alternative forum. In such a case, it is a matter for the election of the party concerned to choose his remedy either by way of a suit before a Civil Court or by way of reference before the Labour Court or Industrial Tribunal under the Industrial Disputes Act.

9. In the present case, the cause of action pleaded in the suits out of which these second appeals arise, is the dismissal of the employees concerned. It is a well-known feature of the law relating to master and servant, that an employee who is wrongfully terminated from his employment has a remedy to sue his employer in a civil Court. A dispute between an employer and an employee in a matter concerning the latter's dismissal must, therefore, be regarded as a dispute which does not arise out of a right conferred or liability, imposed for the first time by the Industrial Disputes Act. The right or liability, on the contrary, has been in existence ever since the law relating to master and servant became part of our common law. In these circumstances, applying the decision of the Supreme Court; the present suits filed by the dismissed employees against the Society must be held to be maintainable, and not barred by the Industrial Disputes Act.

10. There is yet another consideration. The relief claimed by the workmen in their suits is not only a declaration that their dismissal from service was wrongful, but they also ask for a permanent injunction restraining the Society from putting into effect the orders of dismissal. Learned counsel for the Society cannot suggest that these reliefs are beyond the powers of a civil Court to grant. Under our common law, a civil Court is quite competent to give a declaratory relief to a dismissed workman as to his wrongful dismissal. The common law only withholds from the Court's powers, the power to order reinstatement of the dismissed workman in the event of its holding that the dismissal is invalid. In the instant cases, no difficulty is created by the forms of relief asked for by the employees as against the Society. For both declaration and injunction are reliefs well within the Court's province.

11. All things considered, I am satisfied that the Courts below were right in entertaining the suits and proceeding to dispose of them on merits. No argument other than that of the maintainability of the suits was addressed in these second appeals. In any case, the decisions of the Courts below on the merits must be regarded as based on the evidence on record. They do not leave any scope for interference by me in the second appeals.

12. The second appeals are, accordingly, dismissed and the judgment and decree of the Courts below are confirmed. The respondents will have their costs in the appeals (one set).

R.S. —— *Appeals dismissed.*

1. (1975) 48 F.J.R. 252.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Pandurangan ... *Appellant**

v.

Sarangapani and another ... *Respondents.*

(A) *Hindu Law—Pondicherry—Ancestral property in the hands of father — Sons do not acquire any right by birth— Property consequently absolute property of father — Document executed before Notaire, whether can be impeached.*

(B) *Hindu Succession Act (XXX of 1956), section 6—Applicability.*

Under the Hindu Law in force in the territory of Pondicherry, the sons did not acquire any interest in the father's property by birth, whether the property be the self-acquired property of the father or his ancestral property. [*Para. 7.*]

The postulate behind section 6 of the Hindu Succession Act is that the property must be coparcenary property and that term cannot be applied to absolute property held by a father. [*Para.* 10.]

A Notaire is not in the same position as the Registering Authority under the Indian Registration Act and he combines in himself certain other functions. A transaction executed before him may be impeached on the score of falsity by approprite evidence. In terms of the Indian conditions, the impeachment could be by a suit supported by proper evidence to show that the transaction was a false one. [*Para. 13.*]

Case referred to :

Ramalingam v. *Manicka Gounder,* (1980) 2 M.L.J. 350.

Appeal against the decree of the District Court (1st Additional) Pondicherry, dated 28th July, 1977 in Appeal Suit No. 111 of 1974 preferred against the decree of the Court of the Subordinate Judge of Pondicherry, dated 30th September, 1974 in Original Suit No. 69 of 1970.

M. Kalyanasundaram, for Appellant.

J. Stanislas, R. Gopalakrishnan, for Respondents.

The Court delivered the following

JUDGMENT.— This second appeal has been filed by the plaintiff in O. S. No. 69 of 1970 in the Court of the Additional Subordinate Judge, Pondicherry. He filed a suit for a declaration that the sale deed executed in favour of the first defendant and subsequently the sale deed executed by the first defendant in favour of the second defendant are null and void. The suit properties originally belonged to the plaintiff's ancestors. The plaintiff's father got them under a partition dated 31st January, 1922, marked as Exhibit A-1. The plaintiff's father, who is not a party to the suit, executed a sale deed in favour of the first defendant on 6th January, 1969, marked as Exhibit A-12. The first defendant is none other than the brother-in-law of the plaintiff. In other words, the first defendant has married the plaintiff's sister. The sale deed was thus executed by the plaintiff's father in favour of his son-in-law. The first defendant executed a sale deed in favour of the second defendant. The case of the plaintiff was that his father was a person of unsound mind and that the sale deed in favour of the first defendant having been executed when he was a person of unsound mind conveyed no title to the first defendant and that the first defendant in turn cannot sell the properties in favour of the second defendant.

2. The defendants took up the stand that the plaintiff had no *locus standi* to question the alienation, that his father was the absolute owner of the properties and that he could deal with it in the best manner possible. They disputed that the plaintiff's father was of unsound mind and, therefore, incapable of executing the document in favour of the first defendant.

3. The trial Court after framing relevant issues, came to the conclusion that the first defendant purchased the properties from his father-in-law without valid consideration and knowing that he was a lunatic, that the sale deed in his favour was, therefore, null and void and that the second defendant was not a *bona fide* purchaser for valid consideration. In the result, the suit was decreed as prayed for by the plaintiff.

4. The second defendant filed an appeal which was disposed of by the I Additional

*S. A No. 150 of 1078. 19th August, 1981.

District Judge, Pondicherry. He held that it was not proved that the plaintiff's father was of unsound mind at the time of execution of Exhibit A-12, that the plaintiff had no right to question the validity of the sale deed for want of consideration as the vendor alone could do so and that the plea of nullity of the sale deed was not maintainable. It is against this judgment and the decree following it, the present second appeal has been filed.

5. At the time of the admission of the second appeal, the following substantial question of law was framed as arising out of the judgment of the lower appellate Court:

> "Whether the suit properties are ancestral properties in the hands of the plaintiff's father and if so whether the Hindu Succession Act, 1956, is not applicable in which event the plaintiff would be entitled to half share unless the sale by the father was for binding purpose?"

6. The learned counsel for the appellant submitted that the plaintiff had, under the Hindu Law, a right by birth, that the father cannot be taken to be the absolute owner of the properties, that the father was a person of unsound mind and that even if he had any absolute interest the transfer by him in favour of the first defendant was null and void. The respondent, by his counsel, countered these submissions.

7. It is, in this context, necessary to find out the legal position applicable to the Hindus in the State of Pondicherry. Under the Hindu Law in force in that territory, Hindu sons did not acquire any interest in the father's property by birth, whether the property be the self-acquired property of the father or his ancestral property. This proposition was enunciated by the Superior Court of Appeal Pondicherry in Appeal No. 326 of 1974 and has been referred to in *Ramalingam* v. *Manicka Gounder*[1]. In fact the French writer Sanmer in his work on Hindu Law summed up the position as follows:—

> "Today, by virtue of a more correct interpretation of custom, the theory of coparcenary system between father and sons in respect of the ancestral properties is abandoned in our establishment of Coramandal Coast. It is to the head of the family only, in reality, in the juridical sense of the word, the assets deriving from the ancestor belong, and he alone has capacity to exercise, in principal the right to dispose, which is conferred on him by owner's right".

It is this principle of law which indisputably governs the rights of the parties. It is thus clear that the plaintiff's father was the absolute owner of the properties.

8. Mr. G. Subramanyan, learned counsel for the appellant, contended that even assuming that the father held the properties in absolute terms, still the son, *i.e.*, the plaintiff, was in the position of a reversioner, who could dispute the alienation made by the father. For this purpose, he drew on the analogy of reversioners challenging the alienation made by a Hindu widow or other female their. It is true that the Courts have recognised the right of a reversioner to file a suit for a declaration that the alienation by a Hindu widow or other limited owner is not binding upon the reversioner. Such a principle cannot be applied to the facts of the present case, for two reasons. The first is that analogy is a dangerous horse to ride and it would be prudent to keep away from it, and the second is that the father, in the present case, is not in the position of Hindu widow or a female heir, who had only limited powers of disposition over the properties. The father, in the present case, having an absolute interest in the properties had plenary powers of disposition. The analogy of the right of reversioner cannot be applied to the present situation.

9. Learned counsel for the appellant contended that the Hindu Succession Act, 1956 had been extended to the Territory of Pondicherry even in 1963, that the alienation by the father took place in 1969 and that, therefore, the appellant having a right to succeed to the properties, as recognised by that statute, could come forward with the present suit. The provisions of that Act would come in for application only at the time of succession or in other words, when succession opened. The plaintiff cannot invoke the provision of that Act and build up a contention in the circumstances of this case, as the father, the absolute owner is very much alive.

10. Section 6 of the Hindu Succession Act provides that when a male Hindu died after

1. (1980) 2 M.L.J. 350.

the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. The postulate behind this provision is that property must be coparcenary property. The term 'coparcenary property' cannot be applied to the absolute property held by the plaintiff's father and in this case as absolute rights of disposition cut at the rest of the property being coparcenary property. In the case of *Ramalingam* v. *Manicka Gounder*[1], already referred to, it has been held that the plea of survivorship embodied in section 6 is not available in such cases. It would thus follow that the plaintiff has no present right in the properties so as to be in a position to challenge the alienation.

11. On the assumption that the plaintiff can challenge the alienation, the contention that the alienation is null and void as the plaintiff's father was a lunatic may now be examined. The plaintiff relied on Exhibit A-9 under which he had issued to all the Notaires of the Territory of Pondicherry an "opposition" on 5th July, 1963, forbidding them to write any sale deed at the request of his father. The Court below has pointed out that the Gazette Notification under Exhibit A-3 and the caveat to the Notaires have not been issued in pursuance of any Court order. In the absence of any Court order, it is not clear how an advertisement in the Gazette or a mere notice issued to the Notaires could have any legal validity so as defeat the alienation made by the father. No authority was cited before me to show that such notices resulted in emasculating the transactions of their validity.

12. The plea that the father was an insane person and, therefore, the alienation was null and void was sought to be supported by the production of a medical certificate, Exhibit A-8 and also the depositions of P.Ws. 2 and 3. P. Ws. 2 and 3 spoke of the facts as known to them in the year 1963. The medical certificate was issued on 17th December, 1971. We are, however concerned with the validity of the transaction on 6th January, 1969. There is no evidence to show that on the particular date or at or about that time the plaintiff's father was a lunatic. In the light of the above discussion, it would be clear that the alienation in favour of the first defendant as such cannot be impugned and that even assuming that it could be impugned, there is no evidence to show that it lacks any validity.

13. Learned counsel for the respondent submitted that in the case of a document executed before a Notaire, it must be presumed that the document is a valid one. He went to the extent of submitting that the validity of such a document is conclusive. It is true that a Notaire is not in the same position as Registering Authority under the Indian Registration Act and that he combines in himself certain other functions as shown by the decision of this Court in *Mourougaessa Modeliar* v. *Aguilandammalle (died) and others*[1] (by the Bench of this Court consisting of Ismail, J., as he then was, and Natarajan, J.). The functions of a Notaire are not strictly identical with those of the official who is empowered to register the documents under the Indian Registration Act. However, as brought out in an article by L. Neville Brown of the University of Lyons in Volume II (1953) of the International and Comparative Law Quarterly, it is possible to impeach the transaction on the score of falsity by appropriate evidence. The impeachment for falsity is a very involved and costly procedure under the French Law. In terms of the Indian conditions, the impeachment could be by a suit supported by proper evidence to show that the transaction was a false one. In the present case, there is no such convincing proof that the transaction was in any manner false. It appears as if the transaction is being challenged as a kind of a nominal transaction not supported by a consideration. The Court below has pointed out that the document was executed before a Notary public who had the duty to examine personally the parties and to ascertain that they are fit and able to give their consent to the transaction. The burden of proof that lay on the plaintiff to show that the Notaire's duty had not been properly performed in the present case has not been discharged. The result is that the validity of the alienation is not assailable on any grounds taken by the plaintiff. The Court below rightly dismissed the suit.

14. The second appeal is dismissed. There will be no order as to costs.

S. J. —— *Appeal dismissed.*

1. (1980) 2 M.L.J. 350.

1. A. No. 422 of 1969.
Judgment dated 7—12—1977.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Swamikkannu, J.*

Sri Ranganathar Transports (P) Ltd., Thanjavur, represented by its Managing Partner ... *Petitioner.**

v.

The Tanjore Co-operative Marketing Federation Ltd., Tiruvarur, represented by its Secretary ... *Respondent.*

Motor Vehicles Act (IV of 1939) as amended by Act (LVI of 1969), section 110-F—Collision between a transport bus and a lorry—Damage caused to the lorry —Claim for compensation for damage as well as for loss of earnings—Suit filed in civil Court—Maintainability.

A stationary lorry belonging to the plaintiff was hit by a transport bus owned by the defendant due to rash and negligent driving. The lorry not only sustained damage to its head lights and mudguard but it had to remain idle for some time during repairs and lost income which it would have fetched. Clubbing together these items a suit for recovery of damages was filed before the civil Court. Objection was taken to the jurisdiction of the civil Court to entertain the suit on the ground that under the Motor Vehicles Act, 1939, section 110-F the Accidents Claim Tribunal alone can deal with the claim. Reversing the conclusion of the lower appellate Court,

Held, that a reading of section 110-F of the Motor Vehicles Act (IV of 1939) as amended by Act (LVI of 1969) clearly showed that the claim made in the suit, as a matter of fact all the claims, can be entertained only by way of an application, under section 110 by the Tribunal specially constituted for the purpose of adjudication upon such claims and section 110-F clearly barred the jurisdiction of the civil Court with respect to such claims by way of suit and as such the trial Court was correct in holding that the civil Court had no jurisdiction. [*Para.* 6.]

Cases referred to:—

Thillai Govindan v. *Karuppasami*, (1978) 91 L.W. 563; *Union of India* v. *Municipal Corporation of City of Ahmedabad*, A.I.R. 1972 Guj. 61; *Madras Motor & General Insurance Company* v. *G. Murthi*, (1974) 2 M.L.J. 283: A.I.R. 1975 Mad. 21; *M. Ayyappan* v. *Moktar Singh*, A.I.R. 1970 Mys. 67; *N. I. Insurance Company* v. *Shanti Misra*, (1975) 2 S.C.C. 840: (1976) 2 S.C.R. 266: (1976) 2 S.C.J. 309: A.I.R. 1976 S.C. 237; *Union of India* v. *Labh Chand*, A.I.R. 1963 H.P. 12: *State of M.P.* v. *Pehlairai*, A.I.R. 1976 M.P. 208.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Decree of the Court of the Subordinate Judge, Nagapattinam dated 30th November, 1979 and made in A. S. No. 63 of 1979 (O. S. No. 297 of 1978, District Munsif Court, Tiruvarur).

M. Srinivasan, for Petitioner.

R. Vijayan and *Miss K. Manjula*, for Respondent.

The Court made the following

ORDER.—In this civil revision petition, an interesting point has been raised with refeference to the jurisdiction of a civil Court regarding the claim made in a suit filed by the respondent herein for damages that had been caused to the headlight assembly and the bulb, which came to Rs. 159.86, damage to the mudguard, which was repaired and repainted, which came to Rs. 85 and compensation towards the loss of income from the vehicle, namely, the lorry which got damaged, in that it was kept idle for two days, in a sum of Rs. 300 calculating at the rate of Rs. 150/- per day. It is interesting to note that the occurrence of the accident claimed had taken place at Vijayapuram Bazaar, Tiruvarur and the vehicles that collided were a transport bus belonging to the defendant, Sri Renganathar Transports Private Limited, Thanjavur represented by its partner and the lorry MDO 6252, which was owned by the plaintiff, the Tanjore Co-operative Marketing Federation Limited, Tiruvarur by its Secretary. The occurrence wherein these two vehicles collided took place at 3.45 P.M. on 25th June, 1976. According to the plaintiff, the lorry owned by it was proceeding after filling up diesel in the Indian Oil Petrol Bunk at Vijayapuram, and, while it was coming towards west and was also turning to the right in order to return to the plaintiff-society building, which is situated on the east of the petrol bunk on the opposite row, on seeing the defendant's bus approaching at high speed from the west, it was stopped. The

*C.R.P. No. 1038 of 1980. 28*th August*, 1981.

defendant is a private limited bus company and is plying between Thanjavur and Nagoor and the defendant's bus was a vehicle bearing registration No. MDO 7331. At that time, it was proceeding from west to east in the Tanjore Road and was being driven by the defendant's driver in the usual course of his business while in the employment of the defendant. It is the further case of the plaintiff that the defendant's bus, which was approaching at high speed, instead of stopping in order to avoid a collision, came and dashed against the plaintiff's lorry. It is alleged in the plaint that the negligent act of the defendant was responsible for the collision. In other words, it was because of the rash and negligent driving of the bus owned by the defendant that the head light, mudguard etc., of the plaintiff's lorry got damaged. In addition to the compensation claimed in this suit towards damages that were actually caused to the body of the lorry, the claim of Rs. 300, was also made by the plaintiff, in that the lorry had to be kept without being actually put to use by the plaintiff—The Tanjore Co-operative Marketing Federation Limited for transporting commodities dealt with by it, claiming the same as the amount that would have been actually earned by putting the said lorry on the road, at the rate of Rs. 150 per day. Thus, the total claim comes to Rs. 544.85.

2. The learned District Munsif who took the suit on file held that the civil Court has got no jurisdiction, because section 110-F of the Motor Vehicles Act clearly bars the jurisdiction of the civil Court in that any claim made with respect to any collision that takes place between two vehicles or damage to any extent as a matter of fact, may be made only by way of application under section 110 of that enactment as amended by section 57 of Act LVI of 1969, which came into effect from 2nd March, 1970. As a matter of fact, the very same contention is now raised by the learned counsel for the civil revision petitioner, because the lower appellate Court had reversed the judgment of the trial Court, holding that the civil Court has got jurisdiction because it is only compensation claimed for not having facilitated use of the lorry that got damaged in the accident and as such the said claim has nothing to do with the claim contemplated under the provision of section 110 of the Act. It may be noted that the lower appellate Court has confirmed the dismissal of the suit with regard to the claim of Rs.244.85 and set aside the dismissal with regard to the claim of Rs. 300 as compensation for loss of two days, income and remanded the suit for fresh disposal regarding the claim of Rs. 300.

3. Referring to the provisions under section 110 as amended by Act LVI of 1969 as well as the provision under section 110-F which bars the jurisdiction of the civil Court with respect to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area as also the *ratio decidendi* of the decision in *Thillai Govindan v. Karuppasami and others*[1] referred to by the trial Court and the decisions in *Union of India v. Municipal Corporation of City of Ahmedabad*[2], *Madras Motor and General Insurance Company v. G. Murthi*[3], *M. Ayyappan v. Moktar Singh*[4], *N I. Insurance Company v Shanti Misra*[5] it is also pointed out by Mrs. Revathi for Mr. Srinivasan, the learned counsel for the revision petitioner herein that the decision in *N.I. Insurance Company's case*[5], is significant so far as the contention raised in this civil revision petition is concerned because of the clear distinction between jurisdiction of a civil Court with respect to a claim and the claim made by an aggrieved person with respect to any accident that takes place on the highway, and by virtue of the enactment of the provision under section 110-F wherein the claims tribunal has been constdtuted for any area, it has been specifically an mandatorily provided under the said secton that no civil Court shal l have jurisdiction toentertain any question relating to any claim for compensation which may be adjudicated upon by the claims tribunal for that area, and no injiunction in respect of any action taken or to be takenby or before the claims tribunal in respect of the claim for compensation shall be grantedby the civil Court. Referring to the provisions of the above section, the learned counsel for the revision petitioner also refers to the decisions in *Union of India v. Labh Chana*[6] and *State of M.P. v. Pehlairai*[7].

1. (1978) 91 L.W. 563
2. A.I.R. 1972 Guj. 61.
3. (1974) 2 M.L.J. 283: A.I.R. 1975 Mad. 2!.
4. A.I.R. 1970 Mys. 67 at 68.
5. (1975) 2 S.C.C. 840: (1976) 2 S.C.R. 266: (1976) 2 S.C.J. 309: A.I.R. 1976 S.C. 237 at 240.
6. A.I.R. 1963 A.P. 1½at 15.
7. A.I.R. 1976 M.P. 208.

The learned counsel for the petitioner further points out that merely on the ground that a sum of Rs. 300 is claimed towards compensation as a loss of income in that the lorry had been kept by the plaintiff without being utilised for the transport of the commodities dealt with by the plaintiff Co-operative Society, it cannot be said that the jurisdiction of a civil Court can be exercised by entertaining the suit with respect to that claim, as held by the lower appellate Court, because section 110-F is certainly a bar to such kind of entertainment of claim by way of suit, especially when it is in clear terms provided that any claim made with respect to any aggrieved person regarding the vehicle or in respect of the injury sustained by him can be only by an application and not by way of any suit. Anyhow, it is submitted by the learned counsel for the revision petitioner that, subsequent to the amendment by Act LVI of 1969, there cannot be any jurisdiction entertained by any civil Court with respect to a claim of this nature, and that is barred, and that the lower appellate Court is wrong in having held that the trial Court has got jurisdiction to entertain the claim. In this regard, the learned counsel for the revision petitioner also points out that with respect to the two claims; namely, with respect to dents and damage caused to the head-light of the lorry, are concerned, they are exclusively and *ipso facto* damages to the vehicle and as such should be made and must be made mandatorily only under section 110 and that so far as the claim regarding two days non-facilitating of the vehicle in that the vehicle was kept without being actually put on the road for the purpose of the owner's use, the said claim can certainly also came under the interpretation of the phrase "any claim" occurring in section 110-F. I am of opinion that this contention has to be upheld is that any claim also includes claims with respect to the vehicle not being facilitated and that, under the circumstances the suit is not maintainable.

5. Section 57 of the amending Act LVI of 1969 reads as follows:

> "Amendment of section 110. In section 110 of the Principal Act, in sub-section (1) for the words "Motor Vehicles" the following words shall be substituted, namely:
>
> Motor vehicles, or damages to any property of a third party so arising, or both:
>
> Provided that where such claim includes a claim for compensation in respect of damage to property exceeding rupees two thousand, the claimant may at his option, refer the claim to a civil Court for adjudication, and where a reference is so made, the Claims Tribunal shall have no jurisdiction to entertain any question relating to such claim."

6. A clear reading of section 110-F of the Motor Vehicles Act (IV of 1939) as amended by Act (LVI of 1969) clearly shows that the claim now made, as a matter of fact all the claims made in the suit, can be entertained only by way of an application under section 110 by the Tribunal specially constituted for the purpose of adjudicating upon such claims and section 110-F clearly bars the jurisdiction of the civil Court with respect to such claims by way of suit and as such the trial Court is correct in having held that the Civil Court has no jurisdiction. The lower appellate Court has reversed the finding of the trial Court with respect to jurisdiction.

7. Therefore, this civil revision petition is one which has to be allowed under the circumstances and it is hereby allowed, because the point raised is one which is quite amenable to the interpretation that can be given for any claim occurring in section 110-F which bars the jurisdiction of the civil Court so far as the claims made with respect to any accident that takes place. Therefore, without further elaborating the matter which involves the simple question as to whether the claim made in the suit can be agitated by way of a suit, this Court exercising its revisional jurisdiction under section 115, Civil Procedure Code, allows this revision petition.

8. Mr. R. Vijayan learned counsel for the respondent has stated that further elucidation is necessary with respect to the phrase "any claim for compensation" occurring in section 110-F. The section itself is very clear and as such further elucidation is not necessary. Mr. Vijayan submits that the respondent herein may be given an opportunity to put forward his claim before the Tribunal and permission may be given by this Court for filing such application after excusing the delay on account of the pendency of this suit before the trial Court and the appeal before the lower appellate Court. All this will be taken into consideration by the Tribunal when a proper claim is made by the respondent. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *G. Ramanujam and S. Swamikannu, JJ.*

Mangalam and others .. *Appellants**

v.

Express Newspapers Ltd., represented by Managing Director and another ... *Respondents.*

(A) *Motor Vehicles Act (IV of 1939), sections 94 and 95 (1) (b)—Insurer's liability arises only if accident occurred in a public place — 'Public place'' — Definition— Express Estate, whether a public place?*

(B) *Employees' State Insurance Act (XXXIV of 1948) section 53—Claimant taking benefits under the Act cannot challenge vires of the section—Section 61 no bar to claim in respect of a tortious liability.*

Under section 95 (1) (*b*) of the Motor Vehicles Act, the insurer's liability will arise only if the accident had occurred in a public place. "Public place'' is defined in section 2 (24) of the Act as a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access and includes any place or stand at which passengers are picked up or set down by a stage carriage. The question is whether the accident in the instant case occurred in a private place or in a public place. If the accident had occurred in a private place it is common ground that the insurer is not liable. [*Para.* 9.]

The entire Express Estate premises cannot be construed to be a public place merely because a newspaper is printed and published from that place. Merely because a newspaper is a public medium the place where the newspaper is printed and published cannot be taken to be a public place. If that were to be so, every place where books are printed and published will become a public place. The test for finding out whether a place is public or private is to see whether any member of the public would have access as of right to that place. In this case the evidence is clear that the Indian Express Estate is surrounded by a compound and there is a gate through which the entry is regulated by permission. [*Para.* 10.]

It is true Parliament has made a provision in section 110-A of the Motor Vehicles Act or in the Workmen's Compensation Act for payment of compensation in respect of death, or bodily injury to persons involved in an accident. However, while legislating the Employee's State Insurance Act and conferring a benefit on the employees covered thereby, it specifically provided that because of the benefit granted under the Act, claimants cannot claim any benefit under any of the other Acts. The claimants in this case have already taken benefit under the provisions of the Employees' State Insurance Act and are receiving compensatory benefit thereunder in relation to the accident. Therefore it is not open to them to challenge section 53 of the said Act. If they had not obtained any benefit under the said Act and claimed benefit only under the Motor Vehicles Act, the position will be slightly different and it may be open to them to raise a contention that section 53 is *ultra vires*. Now that they had benefits under the provisions of the said Act, they cannot question the validity of section 53. [*Para.* 13].

While section 53 bars any claim for compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise, section 61 bars benefits under other enactments. Since the liability to pay compensation in respect of a motor accident arises under the general law of torts, the liability cannot be said to be one arising under the Motor Vehicles Act and as section 61 of the Employees' State Insurance Act refers to the benefits under other enactments, that section cannot constitute a bar for making a claim in respect of a tortious liability arising out of motor accident. [*Para.* 14.]

Cases referred to:—

Saurashtra Salt Manufacturing Company v. *Bai Velu Raja*, A.I.R. 1958 S.C. 881; *Hindustan Aeronautics* v. *P. V. Perumal*, A.I.R. 1972 Mys. 255; *Queen* v. *Wellard*, (1884) 14 Q.B.D. 63; *Crown Prosecutor* v. *Govindarajulu*, (1916) I.L.R. 39 Mad. 886.

Appeal against the order of the Motor Accidents Claims Tribunal, Madras, dated

*A.A. O. No. 601 of 1978, 2nd July, 1981.

14th November, 1977 and made in O.P. No. 440 of 1974.

S. Gangaram Prasad, for Appellants.

M. R. Narayanaswami for *K. R. Vijayakumar*, for 1st Respondent.

T. S. Rangarajan and *K. S. Narasimhan*, for 2nd Respondent.

The Order of the Court was made by

Ramanujam, J.—This appeal is directed against the award of the Motor Accidents Claims Tribunal, Madras in O.P. No.440 of 1974 dismissing the appellants' claim for compensation in a sum of Rs. 40,000 for the death of one Jayaraman in a motor vehicles accident.

2. On 14th August, 1974 at about 6-30 A.M. the said deceased Jayaraman was working in the Express Newspapers Estate, Madras from north to south. At that time lorry MSY. 2601 belonging to the first respondent Express Newspapers Ltd., proceeding from east towards south driven by one Rajamannar knocked him down and on account of which he sustained multiple and grievous injuries which ultimately resulted in his death in the hospital. On the basis that the said accident was due to the rash and negligent driving of the first respondent's lorry MSY 2601 by its driver the wife and children of the deceased filed a claim petition O.P. No. 440 of 1974 claiming a compensation of Rs. 40,000 as against the first respondent the owner of the vehicle and the second respondent, the insurer with whom the lorry had been insured.

3. The said claim was opposed by the first respondent on the ground that there was no rashness and negligence on the part of the driver of the lorry, that the accident was due to the carelessness and negligence on the part of the deceased himself and that in any event, the compensation claimed was excessive. It was also contended that the deceased was an employee covered by and insured under the Employees' State Insurance Act, and the scheme framed thereunder and the claimants having claimed and obtained compensation under the Employees' State Insurance Act, they have no right to claim compensation under the Motor Vehicles Act and therefore, the claim petition is not maintainable in law.

4. The insurer, the second respondent resisted the claim petition contending that there was no rashness and negligence on the part of the driver of the lorry, that the accident was due to the negligence of the deceased himself, and that the accident having occurred inside the Express Estate which is not a public place, the insurance company is not liable to pay compensation.

5. On these pleadings the points that were set down for consideration by the Tribunal were: (1) Whether the accident occurred due to the rash and negligent driving of the lorry; (2) If so, to what amount of compensation the claimants are entitled? (3) Whether the deceased was an employee covered under the Employees' State Insurance Act and, if so, whether the first respondent is not liable to pay the compensation claimed? and (4) whether the accident occurred in a public place so as to make the insurer liable?

6. The Tribunal, after analysing the evidence adduced by the parties, held that the accident was due to the rash and negligent driving of the lorry by its driver. On the second question the Tribunal held that if the liability of the respondents to pay compensation is upheld, the fair and reasonable compensation would be Rs. 32,600. But as the Tribunal held on questions 3 and 4 that the accident did not occur in a public place and that the claim petition is barred under section 53 of the Employees' State Insurance Act it was held that the claimants are not entitled to claim any compensation under the Motor Vehicles Act. In this view the Tribunal dismissed the claim petition.

7. In this appeal filed by the claimants the only two questions that arise for consideration are: (1) whether the accident occurred in a public place so as to make the insurer liable for compensation in relation thereto; and (2) whether the claim for compensation under the Motor Vehicles Act is barred by section 53 of the Employees' State Insurance Act. The other two questions which were considered by the Tribunal and its findings whereon have become final, do not arise for consideration as those findings are in favour of the appellants in this appeal.

8. Section 94 of the Motor Vehicles Act requires a policy of insurance to be taken out by the owner of a motor vehicle complying with the requirements of Chapter VIII.

9. Section 95 (1) (*b*) of the said Act reads thus:

> "In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which insures the person or clauses of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death, or bodily injury to, any person caused by or arising out of the use of the vehicle in a public place."

Thus it is clear that insurer's liability will arise only if the accident had occurred in a public place. "Public place" is defined in section 2 (24) of the Act as a road, street, way or other place, whether a thoroughfare or not, to which the public have a right or access and includes any place or stand at which passengers are picked up or got down by a stage carriage. The question is whether the accident occurred in a private place or in a public place. If the accident had occurred in a private place it is common ground that the insurer is not liable. In the claim petition the place of accident has been stated as "in Express Newspapers Estate, 3, Club House Road, Madras 2". It is the evidence of P.W. 4, the investigating officer that "the accident was within the premises of Express Estate." Express Estate has a compound wall all round and a gate at the entrance of the premises. P.W. 5 who claims to be an eye witness to the occurrence has stated that the accident occurred within the compound of Express Estate and there was a watchman at the inner gate and a watchman at the outer gate and that he went inside the compound with the permission of the watchman at the outer gate. R.W. 2, the driver of the vehicle involved in the accident had also deposed that the accident occurred inside the compound of the Indian Express Estate. Thus the statement in the claim petition and the evidence of P.Ws. 4 and 5 and R.W. make it clear that the accident occurred inside the compound of the Indian Express Estate which is a private place and not in a public place to which public can enter as of right.

10. The learned counsel for the claimants—appellants would, however, contend that a liberal interpretation has to be given for the expression "public place" occurring in section 95 (1) (*b*) and that since the concern of Express Newspaper which is a public media is housed within the compound, the entire premises must be taken to be one to which the public can have access. The learned counsel refers to a decision of a Division Bench of this Court in *The Crown Prosecutor* v. *Govindarajulu*[1], wherein the harbour premises was held to be a place of public resort. In that case a person was prosecuted for disorderly behaviour in the Madras Harbour premises, under section 75 of the Madras City Police Act. He was acquitted by the Presidency Magistrate on the ground that the harbour premises do not constitute a place of public resort. On appeal the High Court held that the by-laws framed under Port Trust Act prohibiting trespassers or persons who enter the harbour premises without having business there or with the ships lying in the harbour cannot be construed as preventing entry of respectable people and that so long as respectable members of the public have been freely allowed to enter the harbour premises, as well as the very large number of people who have business in the harbour premises or with the shipping, the harbour premises has to be taken to be a place of public resort. We do not see how the entire Express Estate premises can be construed to be a public place merely because a newspaper is printed and published from that place. Merely because a newspaper is a public media the place where the newspaper is printed and published cannot be taken to be a public place. If that were to be so, every place where books are printed and published will become a public place. The test for finding out whether a place is public or private is to see whether any member of the public would have access as of right to that place. In this case the evidence is clear that the Indian Express Estate is surrounded by a compound and there is a gate through which the entry is regulated by permission.

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1. (1916) I.L.R. 39 Mad. 886.

11. The learned counsel for the appellants would refer to the decision in *Queen* v. *Wellard*[1] holding " a legal right of access by the public is not necessary to constitute a public place. A public place is one where the public go, no matter whether they have a right to go or not". It is not possible to equate a premises belonging to a private person as a public place such as harbour, air-port, railway station or bus stand where public are entitled to enter as of right for purpose of utilising the services or facilities offered in those premises. The decision which relates to a harbour premises cannot be applied to a private business house even if it would be the printing and publishing place of a newspaper. Otherwise even shops and hotels which are owned and run by private individuals will become public places as in all such establishments the public are allowed or even invited to enter. We have to therefore hold that the accident in this case occurred in a private place and not in a public place. The result is the insurer of the vehicle is not liable to pay compensation even if the claim petition is maintainable.

12. Coming to the next question as to the applicability of the bar under section 53 of the Employees' State Insurance Act, that section is as follows:—

> "Bar against receiving or recovery of compensation or damages under any other law; an insured person or his dependants shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923, or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act."

It is not in dispute that the deceased was an employee of the Express Newspapers Limited, and that the company is covered by the said Act. It is also not in dispute that the deceased was an insured person under that Act with the first respondent company. Section 53 prevents the insured person or his dependants getting any compensation in respect of an employment injury sustained by him either under the Workmen's Compensation Act, 1923 or any other law for the time being in force. "Employment injury" has been defined as "a personal injury to an employee caused by accident or an occupational disease arising out of and or in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India". According to the first respondent as the injury had occurred in the course of the employment, the death should be taken to be due to an employment injury. In the claim petition it is stated that the accident occurred in the Express Estate. Thus, even according to the claimants the accident occurred within the place of employment. It is the evidence of R. W. 1 the managerof the Mount Road Office of the Employees' State Insurance Corporation that the deceased had workedfrom 10 P.M. on the previous day till 6 A.M. on the date of the accident and that the accident occurred at 6.30 A.M. at the place of employment. It has been held by the Supreme Court in *Saurashtra Salt Manufacturing Company* v. *Bai Velu Raja and others*[1]:

> "As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded. It is now well-settled however, that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman keeping in view at all times this theory of notional extension.'"

Applying the test laid down by the Supreme Court as to the place and the time of the accident, it will be clear that the accident occurred in this case in the course of the employment of the deceased. As a matter of fact the claimants are receiving compensatory benefit under the Employees' State Insurance Act as spoken to by R.W. 1, in relation to the accident and that can only be on the basis that the deceased sustained employment injury within the meaning of section 53 of the said Act. Section 43 specifically bars any claim for compensation or damages under the Workmen's Compensation Act or any other law for the time being in force

1. (1884) 14 Q.B.D. 63.

1. A.I.R. 1958 S.C. 881.

including the Motor Vehicles Act. The object of the said section appears to be to see that the employer is not faced with more than one claim in relation to the same accident. Employees' State Insurance Act has been enacted subsequent to the Motor Vehicles Act. Therefore, once the claimants get the benefit under the Employees' State Insurance Act in relation to an accident, then no claim for compensation under section 110-A of the Motor Vehicles Act could be maintained.

13. The learned counsel for the appellant contends that section 53 is *ultra vires* the powers of Parliament as the benefit given under the Motor Vehicles Act has been taken away by the provision in section 53. We do not see how section 53 can be held to be *ultra vires*. It is true the Parliament made a provision in section 110-A of the Motor Vehicles Act or in the Workmen's Compensation Act for payment of compensation in respect of death or bodily injury to persons involved in an accident. However, while legislating the Employees' State Insurance Act and conferring a benefit on the employees covered thereby, it specifically provided that because of the benefit granted under this Act, claimants cannot claim any benefit under any of the other Acts. The claimants in this case have already taken benefit under the provision of the Employees' State Insurance Act and are receiving compensatory benefit thereunder in relation to the accident. Therefore it is no longer open to them to challenge section 53 of the said Act. If they had not obtained any benefit under the said Act and claimed benefit only under the Moter Vehicles Act, and the position will be slightly different and it may be open to raise a contention that section 53 is *ultra vires*. Now that they had benefits under the provisions of the said Act, they cannot question the validity of section 53.

4. The learned counsel for the appellants would however, refer to the decision in *Hindustan Aeronautics v. P.V. Perumal*[1] wherein it was held that the claims for compensation arising under section 110-A of the Motor Vehicles Act are not barred under section 61 of the Employee's State Insurance Act. However, we do not see how that decision is relevant here. Section 61 is in the following terms:—

> "Bar of benefits under other enactments: when a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment."

While section 53 bars any claim for compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise, section 61 bars benefits under other enactments. The view taken by the Mysore High Court was that compensation or damages claimed under 110-A of the Motor Vehicles Act is based on the law of torts and that it is not a benefit under the Motor Vehicles Act though that Act contains the procedure for making a claim and for the enforcement of that claim. Since the liability to pay compensation in respect of a motor accident arises under the general law of torts, the liability cannot be said to be arising under the Moter Vehicles Act and as section 61 of the Employees' State Insurance Act refers to the benefits under other enactments, that section cannot constitute a bar for making a claim in respect of a tortious liability arising out of a motor accident. The reasoning of the Mysore High Court for holding that section 61 is not a bar for claiming compensation under section 110-A of the Motor Vehicles Act is as follows:

> "It is true that the Motor Vehicles Act is a special law. It is also true that it is an enactment. But the crucial point for determination is whether the provisions of section 110 to 110-F of the Motor Vehicles Act are provisions relating to procedural law or of substantive law. Reading the sections 110 to 110-F of the Motor Vehicles Act it is evident that they provide for adjudication upon claim of compensation in respect of accidents involving the death or injury to persons arising out of the motor vehicles. Section 110-A creates a right to make an application arising out of an accident. Section 96 creates a liability to pay such compensation on the part of the insurer. Section 110-F bars the jurisdiction of the civil Courts to make adjudication which could be made by the claims Tribunal for the area for which such Tribunal has been constituted. It is thus clear that a claim for compensation could be made only under the provisions of Chapter VIII of the Motor Vehicles Act by the Claims Tribunal, but, the right to sue is quite a different matter which originates from suit. stantive law, namely, the law of Torts. Evidently the law of Torts is not an enactment. Consequently, the provisions of

1. A.I.R. 1972 Mad. 255.

section 61 of the Employees' State Insurance Act cannot be attracted to such a case."

Thus, in view of the above discussion, we have to uphold the award of the Tribunal in this case. The appeal is therefore dismissed but without costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

T. Thiruppathi ... *Petitioner**

v..

Maimoon Bibi and others ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 14 (1) (b)—"Demolition" and "erecting a new building"—Meaning.

Held: In a claim under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, the demolition contemplated by it is one by which the building must come to an end so totally as to amount to substantially deceasing to exist as the expression "a new building" would indicate something different from what was in existence and the property or the site to be more accurate, must be brought into being after demolition. The demolition is therefore to obliterate substantially the old building and the construction must bring into being a new building. In the present case the proposed renewal of the existing roof of the front portion of the building and converison into reinforced concrete and the alteration of the tiled verandahs and shifting of the latrine will not amount to demolition and the conclusion arrived at by the appellate is authority is correct and no interference is called for. [*Paras.* 5, 7.]

Cases referred to:—

K. Krishnan v. *Munusamy*, (1978) 2 M.L.J. 510: 91 L.W. 454: I.L.R. (1978) 3 Mad. 193: A.I.R. 1979 Mad. 50; *Ramachandra* v. *Kasim Khaleeli*, (1965) 1 M.L.J. 78; *Pattabhiraman* v. *Accommodation Controller*, (1971) 2 M.L.J. 326: 84 L.W. 779: A.I.R. 1972 Mad. 102; *S. A. Henry* v. *J. V. K. Rao*, (1971) 2 M.L.J. 297: 84 L.W. 523: A.I.R. 1972 Mad. 64; *Varghese* v. *Mrs. Irudaya Mary*, (1979) 92 L.W. 75; *A. M. Batcha* v. *T. M. P. C. Ramachandran*, 1979 T.L.N.J. 73; *M. Kanakavel Pillai* v. *Drugs and Chemicals*, (1980) 2 M.L.J. 392; *A. G. Kannappa Nadar* v. *Krishnaswamy Pillai* (1981) 1 M.L.J. (Sh. Notes) 19.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1972, praying the High Court to revise the Order of the Court of the Principal Subordinate Judge (Appellate Authority) Madurai dated 7th November, 1978 and made in C.M.A. No. 238 of 1976. R.C.O.P. No. 569 of 1974 on the file of the Court of the I Additional District Munsif (Rent Controller) Madurai Town).

O.V. Balaswami, for Petitioner.

T.R. Ramachandran, *T.R. Rajagopalan* and *T.R. Rajaraman*, for Respondents.

The Court made the following

ORDER.—This civil revision petition arises out of the order of the appellate authority and the Subordinate Judge of Madurai passed in C.M.A. No. 238 of 1976, dismissing the claim of the landlord, the civil revision petitioner, for eviction from the premises bearing Door No. 232, East Masi Street, Madurai Town, on the ground that the landlord required the same for the purpose of demolition and reconstruction under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, hereinafter referred to as the Act. Originally the landlord filed R.C.O.P. No. 569 of 1974 on the file of the Court of the District Munsif and the Rent Controller, Madurai Town for eviction of the tenants, the respondents herein, on the ground that the landlord required the premises for the purpose of demolition and reconstruction and also on the ground that the tenants had caused damages to the building. The learned Rent Controller after enquiry held that the landlord had not proved the second ground *viz*, the tenants had caused damages to the abovesaid building. But as regards the first ground the learned Rent Controller came to the conclusion that the landlord required the abovesaid premises for the purpose of demolition and reconstruction. In view of the finding that the landlord required the premises for the immediate purpose of demolition and reconstruction, the learned Rent Controller ordered eviction of the tenants by granting a month's time to vacate the premises. As against the order of the Rent Controller the tenants filed an appeal in C.M.A. No. 238 of 1976 on the file of the appellate authority and

* C.R.P. No. 1922 of 1979. 8th September, 1981.

the Subordinate Judge of Madurai and the learned appellate authority after considering the evidence on record dismissed the appeal and confirmed the finding of the Rent Controller. As against the said order of the appellate authority the tenants filed a revision petition to this Court in C.R.P. No. 41 of 1975 and this Court after considering the material on record allowed the revision and remanded the matter to the appellate authority directing the appellate authority to dispose of the appeal in the of light of the decision reported in *K. Krishnan* v. *Munusami*.[1] After remand the appellate authority considered the matter a fresh in the light of the above-said decision and came to the conclusion that what the civil revision petitioner, the landlord, proposed to do cannot amount to demolition of the existing building and the erection of a new building within the meaning of section 14 (1) (*b*) of the Act and allowed the appeal and dismissed the rent control petition. As against the said order of the appellate authority this civil revision petition has been filed.

2. An interesting question of law arises in this civil revision petition, *viz.*, as to what is the meaning to be given to the terms "demolition" and 'erecting a new building' occurring in section 14 (1) (*b*) of the Act. Section 14 (1) (*b*) reads as follows:—

> "14. *Recovery of possession by landlord for repairs or for reconstruction.*—(1) Notwithstanding anything contained in this Act, but subject to the provisions of sections 12 and 13, on an application made by a landlord, the Controller shall if he is satisfied,
> (*b*) that the building is *bona fide* required by the landlord for the immediate purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date."

Section 16 (2) of the Act provides that in case of erection of a new building all the provisions of the Act shall cease to apply to such a new building for a period of five years from the date of construction. Section 16 (2) of the Act reads as follows:

> "16 (2). Where in pursuance of an order passed by the Controller under clause (*b*) of sub-section (1) of section 14, any building is totally demolished and a new building is errected in its place, all the provisions of this Act shall cease to apply to such a new building for a period of five years from the date on which the construction of such new building is completed and notified to the local authority concerned."

1. (1978) 2 M.L.J. 510: 91 L.W. 454: I.L.R. (1978) 3 Mad. 193: A.I.R. 1979 Mad. 50.

3. The case of the civil revision petitioner in this case is that he wants to remove the Madras terrace in the front portion of the building and errect R.C. pillars and put up R.C. terrace in its place and also put up a first floor with R.C. terrace. He also proposes to renew the floor of the hall next to the Madras terrace and replace some of the rafters in the terrace. The civil revision petitioner also proposes to demolish the verandahs with tin sheet roofing and tiled roofing by converting the same into a Madras terrace. He also proposes to shift the latrine to the vacant site situated in the northern side of the verandah from the front portion of the building. The plan which the civil revision petitioner submitted for carrying out the above-said alterations is marked as Exhibit A-4. It is seen that the proposed demolition is not in respect of the entire building but on with reference to a portion of the building. Similarly new constructions are proposed to be put up on the up-stairs of the R.C. portion and the tiled single roof verandah is to be convered into terrace verandah and the latrine in the front portion of the building is to be shifted to the rear verandah. The case of the civil revision petitioner is that carrying out the above said items of work will amount to demolition and reconstruction and the case of the respondents is that these items of work will not amount to demolition of an old building and the construction of a new building which will entitle the civil revision petitioner for eviction of the respondents under section 14 (1) (*b*) of the Act.

4. "Demolition" is not defined in the Act. The effect of the words "demolition" and "erection of a new building" occurring in section 14 (1) (*b*) of the Act had been considered in several decisions of this Court. A single Judge of this Court in the case reported in *Ramachandra* v. *Kasim Khaleeli*[1] observed as follows:

> "Section 14 (*b*) confers the right on the landlord to get the tenant evicted if he *bona fide* requires the building for the immediate purpose of demolishing it and if such demolition is to be made for the purpose of

1. (1965) 1 M.L.J. 78.

erecting a new building on the site of the building sought to be demolished. It is not necessary that the building should be very old and decrepit to enable the landlord to claim that his immediate purpose was demolition of the building. All that the sub-section requires is that the building should be *bona fide* required for the immediate purpose of demolishing it, with a view to erecting a new building. If these conditions are satisfied, the landlord is entitled to ask for eviction. The contention of the learned counsel that the demolition intended should be total is not supported by any authority. In this case, the roof of the premises that is in the occupation of the petitioner is to be demolished and a stair-case put, retaining only the walls. This, in my opinion, would amount to demolition."

This view of the learned single Judge of this Court that the demolition of the roof of the premises and putting up a stair-case will amount to demolition had not been accepted by a Division Bench of this Court in the case reported in *K. Krishnan* v. *Munusamy*[1], where it has been held that a change of the roof of the building will not by itself amount to demolishing a building and putting up a new building on the site of the old building and in such a case section 14 (1) (*b*) of the Act will not be attracted. The Division Bench observed as follows:

"A change from one type to another may perhaps be a change of a substantial nature so far as the roof is concerned. But when one talks of demolition of a building as contemplated in section 14 (1) (*b*), it is difficult to assume that the change of a roof will amount to demolition of the building."

During the course of the judgment the Division Bench referred to an earlier decision of a single Judge of this Court reported in *Pattabhiraman* v. *Accommodation Controller*[2] and the following passage is also extracted:

"As already stated the plan produced clearly makes out the situation that the first floor is sought to be interfered with materially and in many respects by the petitioner when he reconstructs the building in accordance with the sanctioned plan. The cubical content of enclocsed space is increased or altered. The walls are changed and above all the roof of the premises removed and substituted by another. In a case where the roof of a premises is removed and substituted and this is followed up by a variation of the space content of the quondam building, then undoubtedly the entire process involves not only demolition, but also reconstruction...."

"I have already expressed the view that the work to be undertaken by the petitioner is effectively to change the entire face of the building, its cubical content and its size. More than anything else the roof is sought to be removed and substituted, by another of a different variety altogether."

In the course of the judgment the Division Bench also referred to a decision reported in *S. A. Henry* v. *J. V. K. Rao*[1], where Ramamurti, J., observed as follows:—

"There is a lacuna in the Act since section 14 (1) (*b*) would be attracted only in case of repairs as defined in the Act to which we have already made a reference, and the provisions in section 14 (1) (*b*) provided for demolition and erection of a new building on the same site, and in between 'repairs' as defined in the Act, and 'demolition and erection of a new building', there could be many changes which could be made to a building and for which there is no provision made in the Act. In other words, when changes much more substantial than mere 'repairs' fall for consideration, the learned Judge felt that if a technical meaning is to be given for the words 'demolishing and erecting a new building on the site' appearing in section 14 (1) (*b*) many cases where substantial changes which have to be made would not fall within the scope of the Act and therefore, the words appearing in section 14 (1) (*b*) must be given a larger import than what they appear to convey by reading them in the ordinary manner."

This view of Ramamurti, J., was not accepted by the subsequent Division Bench of this Court referred to above. *K. Krishnan* v. *Munuswami*.[2] Referring to the above judgment the Division Bench observed as follows:—

1. (1978) 2 M.L.J. 510: 91 L.W. 454: I.L.R. (1978) 3 Mad. 193: A.I.R. 1979 Mad. 50.
2. (1971) 2 M.L.J. 326: 84 L.W. 779: A.I.R. 1972 Mad. 102.

1. (1971) 2 M.L.J. 297: 84 L.W. 523: A.I.R 1972 Mad. 64.
2. (1978) 2 M.L.J. 510: 91 L.W. 454: I.L.R. (1978) 3 Mad. 193: A.I.R. 1979 Mad. 50.

"We have to interpret the statute and gather the intention of the legislature according to the words used applying the well-known principle that normally we must attach to those words a grammatical and literal meaning attributable to those words. Only in exceptional circumstances where obsurdities would result by such interpretation, a Court in interpreting the words in a statute can add to the words or attribute a meaning different from the meaning that is ordinarily applicable. It is perhaps true that some changes in a building which would not fall under the expression 'repairs' as defined in the Act, would not amount to demolishing and erecting a new building on the site and if they fall out of the ambit of section 14 (1) (*b*) of the Act, eviction for those purposes may not be possible. We cannot rectify any lacuna, even if that be."

In construing the words 'demolition' and "erection of a new building' occurring in section 14 (1) (*b*) of the Act the Division Bench observed as follows:—

" 'Demolition' mentioned in section 14 (1) (*b*) has not been defined under the Act nor is there any definition as to what is meant by a 'new building'. But turning to the scheme of the Act, it is clear that a freedom is given to the landlord when the requirements of section 14 (1) (*b*) are made out, to ask for 'possession' of the building let out, and demolish that building and on the site on which the building stood, erect a new building. Apart from the requirement of section 14 (1) (*b*) there is the requirement under section 14 (2) (*b*) that the landlord should undertake to commence demo'ishing material portion of the building not later than one month and complete the demolition before the expiry of three months from the date he recovers possession of the entire building. On failure to comply with the requirement in section 14 (1) (*b*) the tenant can ask for recovery of possession of the building from the landlord under section 16. These provisions in section 14 (1) (*a*) and (*b*) provide that the Rent Controller shall be satisfied that the requirements of the landlord are *bona fide*, namely for the purpose of demolishing and erecting a new building, on the site of the building. Section 14 (2) (*b*) insists that the work of demolishing a material portion of the building should be commenced not later than one month and completed before the expiry of three months from the date the landlord recovers possession of the entire building. If he does not comply with those requirements, his *bona fide* requirement would be belied and in such circumstances, the tenant will be restored to the building and the eviction ordered would thus become ineffective."

The Division Bench taking into consideration the definition of 'building' which includes part of a building also, observed as follows:—

"As far as the tenant is concerned that part of the building which is let out to him will be building in reality and that reality has been recognised by the statute and specifically provided for in the definition referred to above. As far as such a tenant of a part of the building is concerned, when the statute talks of demolition of a building, it means the building that is let out to him or in other words that part of the building which formed the transaction of tenancy. We are adverting to this aspect only to make it clear that the entire structure of the building need not be demolished and a new building erected in its place in order to attract section 14 (1) (*b*). When a part of a building is to be demolished which was under the tenancy of a person it will be sufficient if that part is demolished and a new building is erected on the site."

In cases where the lease is in respect of the whole building, the Division Bench observed as follows:—

"If we conceive the ordinary meaning of the word 'demolition' it would mean a destruction so total as to result in the ruins of the building. In Chamber's Twentieth Century Dictionary, the word 'demolish' in its verb form is given the meaning as to destroy', 'lay in ruins', 'to ruin'. The noun form 'demolition' is given the meaning as 'act of pulling down' and 'ruin'. Ordinarily we must give the natural meaning to the word when it is used in a statute, unless the statute is of a particular nature which would oblige the Court or compel it to give some special meaning to that word. No argument was advanced before us that the nature of the statute and the context in

which the word appears are such that the word 'demolition' appearing in section 14 (1) (*b*) should be given a special meaning. We therefore consider that the old building which was let out, by the act of demolition must come to an end so totally as to amount to substantially ceasing to exist. In fact section 16 (2) of the Act in referring to the word 'demoliton' uses the 'expression' totally demolished'.

....

The word 'totally' no doubt is not used in section 14 (1) (*b*). Even then, we cannot ignore this expression in section 16 (2) for understanding the scope and ambit of the word 'demolition' occurring in section 14 (1) (*b*). The purpose and intent of the statute appears to be that whenever an old building has to be demolished and a new building has to be erected on the site of the old building, the Act is not to apply so far as the new building is concerned for a period of five years from the completion of the new building. We have already adverted to the fact that the only requirement to enable a landlord to ask for possession is that he *bona fide* required the building for the purpose of demolition and/or erecting a new building on the same site and that his failure to do so will visit upon the tenant the right to move the Court to take possession of the buliding from the landlord."

The view of the Division Bench is that in view of the word "totally" occurring in section 16 (2) the ambit of the word "demolition" occurring in section 14 (1) (*b*) can only be total demolition.

The view of the Division Bench clearly appears to be that in a claim under section 14 (1) (*b*) the demolition contemplated by that section is one by which the building must come to an end so totally as to amount to substantially ceasing to exist and the expression "a new building" would indicate that something different from what was in existence on the property or on the site to be more accurate, must be brought into being after demolition. The demolition is therefore to obliterate substantially the old building and the construction must bring into being a new building:

6. Bearing the above principle in mind we will have to look into the facts of the present case. According to the plan Exhibit A-4 and the evidence of P. W. 1 the landlord wanted to remove only the front portion of the building and replace with Madras terrace and certain other repairs, are to be carried out to the building. Evidently the demolition contemplated in the present case is not so total as to say that the old building ceases to exist. My attention is also drawn to a decision of a single Judge of this Court reported in *Varghese and another* v. *Mrs. Irudaya Mary*[1] where the following observation is found:—

"The next submission made by the learned counsel is that the plan filed by the respondent indicates that the respondent proposed to change only the tiled roof into R. C. C. roof and that will not amount to demolition and reconstruction. For this, the learned counsel invokes the aid of the decision of a Bench of this Court in *Krishnan* v. *Munusami.*[2] But, the authorities below after looking into the plan have held that there is not only the change of the roof, but also a change in the plinth area as between the old tiled construction and the new construction with R. C. C. roof. I have also perused a copy of the plan produced by the petitioner's counsel. It clearly indicates that the proposed R.C.C. structure is to be of a larger area than the area covered by the tiled building. As a matter of fact, the open space in between the two tiled structures is to be covered by the R C. C. roofing. Therefore, the authorities below appear to be right in holding thatthere is not only a change in the roofing, but also a change in the area in that the new structure includes a larger area over and above the area covered by the tiled structure."

The learned counsel for the petitioner herein relied upon this case in support of his argument that in order to attract the provisions of section 14 (1) (*b*) it is sufficient that there is a change in the plinth area and the roof. But at the same time it will have to be noted that the process of demolishing an old structure and putting up a R. C. C. structure with a larger area involves total demolition of the old structure. Hence this cannot in any way support the case of the civil revision petitioner. In the case reported in *A. M.*

1. (1979) 92 L.W. 75.
2. (1978) 2 M.L.J. 510: 91 L.W. 454: I.L.R. (1978) 3 Mad. 193: A.I.R. 1979 Mad. 50.

Batcha and another v. *T.M.P.C. Ramachandran*[1] this Court after quoting with approval the decision of the Division Bench referred to above, also extracted the following passage in the report in *Pattabhiraman* v. *Accommodation Controller, Madras.*[2]

"As already stated the plan produced clearly makes out the situation that the first floor is sought to be interfered with materially and in many respects by the petitioner when he reconstructs the building in accordance with the sanctioned plan. The cubieal content of enclosed space is increased or altered, the walls are changed, and above all the roof of a premises is removed and is substituted and that is followed up by a variation of the space content of the quondam building, then undoubtedly the entire process involves not only demolition, but also reconstruction."

In the course of the judgment Ramaprasada Rao, J., as he than was, observed as follows:—

"It appears to me, therefore, that under section 14 (1) (*b*) the word demolition has to be understood not merely in the dictionary meaning sense, but in the sense where there is a real variation in the cubical content of the enclosed space by the roof being altered, the size of the walls being changed by demolishing it, a new roof being substituted thereon and by putting up an additional construction on the new roof by erecting pillars from its foundation."

This observation is sought to be relied upon by the learned counsel for the civil revision petitioner in support of his argument that the proposed reconstruction would change the cubical content of the building and as such the landlord is entitled to relief under section 14 (1) (*b*) of the Act. But it is seen from the evidence and the plan that there is no demolition of the entire walls and the roofing, and in fact a substantial portion of the walls and the roof of the building is retained. There is also no evidence as to the cubical content of the building before and after reconstruction. Hence the principles laid down in the case reported in *A. M. Batcha and another* v. *T.M.P. C. Ramachandran*[1] cannot be applied to the facts of this case. In the case reported in *M. Kanakavel Pillai by agent M. Sollaiyah Pillai* v. *Drugs and Chemicals, Kumbakonam by its Managing Director, T. Ramani*[1], Ratnam, J., following the observation of the Division Bench reported in *K. Krishnan* v. *Munusamy*[2] held that in a case where the middle portion of the building, where Madras terrace roof is in existende, is proposed to be left untouched and with reference to the front and the rear portions it is proposed to convert the existing thatched and tiled roof into R.C.C. roofing it will not amount to demolition and reconstruction within the meaning of section 14 (1) (*b*) of the Act. In *A. G. Kannappa Nadar* v. *Krishnaswamy Pillai*[3] a single Judge of this Court held that the proposal to remove the existing damaged tiled roof in the first floor and to convert it in to a Madras terrace cannot be within the expression "demolition and recoustruction", as a change of the roof of the building from tiles into a Madras terrace would not amount to demolishing the building and putting up a new building on the site of the old building. The renewal of the damaged stair-case and the proposal to put up another stair-case instead also connot be included with the expression "demolition and reconstruction".

7. In the light of the principles set out in the above decisions if we examine the facts of this case it is seen that the proposed renewal of the existing roof of the front portion of the building and conversion into reinforced concrete and the alteration of the tiled verandahs and shifting of the latrine will not amount to 'demolition' and the conclusion arrived at by the appellate authority is correct and no interference is called for. The civil revision petition fails and is dismissed. There will be no order as to costs.

8. At the time of pronouncement of judgment Mr. O.V. Baluswmy submits that an observation may be made that the order in the above C.R. P. will not, in any way prejudice the right of the landlord to apply for demolition of the entire building and for reconstruction afresh. I have no hesitation in making an observation that this order will not, in any way, prejudice the case of the landlord if and

1. (1979) T.L.N.J. 73.
2. (1971) 2 M.L.J. 326: 84 L.W. 779: A.I.R. 1972 Mad. 102.

1. (1980) 2 M.L.J. 392.
2. (1978) 2 M.L.J. 510: 81 L.W. 454: I.L.R. (1971) 3 Mad. 193: A.I.R. 1979 Mad. 50.
3. (1981) 1 M.L.J. (Sh. N) 19.

when he comes forward with an application for total demolition of the premises. The defences available to the tenants are also left open.

R. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

V. A. Palayyan ... *Petitioner**

v.

Chandramohan .. *Respondent.*

Civil Procedure Code (V of 1908), Order 8, rule 6-A—Conuter-claim by defendant in excess of suit claim, not maintainable.

Held, The Small Causes Court has no pecuniary jurisdiction under section 15 of the Provincial Small Causes Court Act and the Notification under the Act to consider a claim of over Rs. 500 and there cannot be a counter-claim under Order 8, rule 6-A of the Civil Procedure Code, for any amount in excess of the pecuniary jurisdiction of the Small Causes Court. The action of the lower Court in passing a decree on the counter-claim for Rs. 593.75 in favour of the defendant is clearly beyond its jurisdiction and the same will have to be set aside. While confirming the dismissal of the suit the decree passed on the counter-claim is set a side and the papers returned for presentation to the proper Court.

Petition under section 25 of the Provincial Small Causes Court Act, praying the High Court to revise the order of the Court of the Additional District Munsif, Padmanabhapuram, dated 25th Janauary, 1980 and made in S.C.S. No. 90 of 1978.

K. Sreekumaran Nair, for Petitioner.

Miss O.K. Sridevi, for Respondent.

The Court made the following

ORDER.— This civil revision petition is filed against the judgement and decree of the learned Additional District Munsif, Padmanabhapuram rendered in S.C.S. No. 90 of 1978. The plaintiff who is a chit foreman had filed the above suit alleging that the defendant had paid five instalments and since the chit was discontinued the defendant is entitled to the refund of the amount paid by him, that the defendant borrowed a sum of Rs. 600 for marriage expenses and promised to pay the same, after adjusting the chit subscription from the amount borrowed by him. that the plaintiff is entitled to a sum of Rs. 373.95. In the suit the defendant filed a counterclaim for Rs. 750 on the ground that he paid six instalments amounting to Rs. 750. The learned District Munsif after taking evidence came to the conclusion that the defendant is entitled to a sum of Rs. 593.75 towards refund of the instalments paid to the plaintiff by way of chit subscription. The learned District Munsif also found that the alleged borrowing of Rs. 600 by the defendant is not proved and eventually passed a decree in the counterclaim for Rs. 593.75. This civil revision petition is filed against the said judgment and decree of the learned District Munsif by the plaintiff.

The finding regarding the facts rendered by the learned District Munsif is not disputed. The only objection taken by the civil revision petitioner is that the jurisdiction of the District Munsif's Court is restricted to Rs. 500 under section 15 of the Provincial Small Causes Courts Act and the Notification under the Act and there cannot be a counter claim under Order 8, rule 6-A of the Code of Civil Procedure, for any amount in excess of the Small Causes Court. This objection is well founded since the Small Causes Court has no pecuniary jurisdiction to consider a claim over Rs. 500. The action of the lower Court in passing a decree in the counter claim in favour of the defendant is clearly beyond its jurisdiction and the same will have to be set aside. Hence the dismissal of the Small Cause suit is confirmed and the decree passed in the counter-claim is set aside and the counter-claim is directed to be returned for presentation to the proper Court. In the result the civil revision petition is party allowed and there will be no order as to costs.

R.S. —— *Petition partly allowed.*

*C.R.P. No. 2476 of 1980.
.. *30th October,* 1981.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R Sengottuvelan, J.*

M. Thangiah Nadar and Sons a registered Partnership Firm represented by one of its Partners T. Pandirajan ... *Petitioner**

v.

R. Rajathi Ammal ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (2) (ii) (a), 10 (3) (a) (ii)—Petition for eviction on ground of sub-letting and requirement for owner's occupation—Tenant permitting third party to use the premises along with him may not amount to sub-letting—Exhibition of board of a company different from the tenant, without transfer of possession of the premises will not amount to subletting—Landlord occupying two rented premises for his non-residential purposes if evicted from one of such premises is entitled to ask for possession of another non-residential building of his own.

The main criterion is whether the tenant had permitted a third party to occupy the premises and had divested himself completely of the possession of the premises or a part thereof. If the tenant had permitted another person to use the premises along with him it may not amount to sub-letting. The test seems to be whether the tenant had retained the possession and control of the premises with himself. The mere exhibition of a name-board of a company (different from the tenant) will not amount to transfer of possession of the premises. [*Paras.* 11 *and* 12.]

A proper construction of the words "a business which the landlord or any member of his family is carrying on" occurring in section 10 (3) (*a*) (*iii*), (Act of XVIII 1960) will include a business carried on in a branch also. Hence where a landlord was occupying two premises for non-residential purposes and he was evicted from one of such premises he will be entitled to ask for possession of another non-residential building of his own. [*Para.* 16]

Cases referred to:—

K. Venkataramani v. *S. Aravamuthan*, (1981) 1 M.L.J. 516; *Petroleum Workers' Union represented by the General Secretary* v. *M/s A. Mohamed and Company*, (1966) 1 M.L.J. 356: I.L.R. (1967) 2 Mad. 787: 79 L.W. 100: A.I.R. 1967 Mad. 33; *Peebles* v. *Crosthwaite*, (1897) 13 T.L.R. 198; *Jackson* v. *Simons*, (1923) 1 Ch. 373; *Stering* v. *Abrahams*, (1931) 1 Ch. 470; *Vedachalam* v. *Kanniah*, (1957) I M.L.J. (Short Notes) 24; *Venkateswara Iyer* v. *Lakshmnarayana Rao*, (1964) 2 M.L.J. (Sh. N.) 44; *M. Radgers* v. *M. Prakash Rao Naidu*, (1969) 1 M.L.J. 332; *The Vellore Shroj Kumaraswami Chetti Choultry by the Executive Trustee V. K. Konnappa Chettiar* v. *Veerasami*, (1972) 1 M.L.J. 184: 85 L.W. 192: A.I.R. 1972 Mad. 303; *The Jamia Darus Salam Arabic College Trust by its Honorary Secretary Kaka Haji Mohammad Omar* v. *B. Rajanna*, (1972) 2 M.L.J. 141; *P. M. Mohideen Sahib* v. *Mohammed Habibulla Sahib*, (1975) T.L.N.J. 53; *M/s. Glamour Saree Museum* v. *The Tamil Nadu Handloom Weavers' Co-operative Society Ltd.*, (1969) 2 M.L.J. 493; *B. Balaiah* v. *Chandoor Lachiah*, (1965) 2 An. W.R. 95: A.I.R. 1965 A.P. 435; *Kolisetti Venkaiah* v. *Tadikamalla Satyanarayana*. A.I.R. 1972 A.P., 123; *Easwaran Chettiar* v. *K. Subbarayan*, (1970) 83 L.W. 696: A.I.R. 1971 Mad. 163; *V. R. Jayaraman* v. *N. Se Ramalingam*, (1973) T.L.N.J. 393; *Ramalinga Moopanar* v. *Narayana Iyer*, (1951) 1 M.L.J. (Sh. N.) 7; *J. N. Gulamali* v. *Howrah Casting, Company*, (1978) 91 L.W. 133.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Order of the Court of the Subordinate Judge Madurai (Appellate Authority), dated 26th April, 1979 and made in C.M.A. No. 288 of 1978, reversing the order and decree, dated 5th July, 1978 in RCOP No. 191 of 1978 on the file of the Court of the Rent Controller (District Munsif Madurai Taluk.)

The Advocate General, *D. Raju, A.R. Lakshmanan* and *S. Ramalingam*, for Petitioner.

S. Subbiah and *S. R. Ramalingam*, for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is filed by the tenant occupying Door No. 38, Chitrakkara Street, Madurai, a non-residential premises, against whom an order of eviction is passed by the appellate authority and the Principal Subordinate Judge, Madurai in C.M.A. No. 288 of 1978. Originally the landlady, the respondent herein, who is the owner

*C.R.P. No. 1396 of 1979. 18th September, 1981.

of the above-said premises filed an application in R.C.O.P. No. 191 of 1978 on the file of the Court of the Rent Controller and the District Munsif, Madurai Taluk for evicting the tenant on the ground that the tenant had sub-let the premises under section 10 (2) (*ii*) (*a*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, hereinafter referred to as the Act and on the ground that the landlady requires the premises for her own business under section 10 (3) (*a*) (*iii*). The learned Rent Controller after considering the evidence let in by both the sides found against the landlady on the above-said both the grounds and dismissed the rent control petition. As against the order of dismissal the landlady filed C.M.A. No. 288 of 1978 on the file of the Court of the appellate authority and the Principal Subordinate Judge and the learned Appellate authority after considering the material on record confirmed the order of the Rent Controller regarding the claim for eviction on the ground that the landlady requires the premises for her own use and reversed the finding of the Rent Controller in respect of the claim for eviction on the ground that the tenant had sub-let the premises and ordered eviction of the tenant. This civil revision petition is filed by the tenant against the order of eviction passed by the appellate authority on the ground that the tenant had sub-let the building.

2. Since the landlady prayed for eviction on both the grounds *viz.*, the requirement of the premises for her own use and on the ground the tenant had sub-let the premises and eviction was ordered only on the ground that the tenant had sub-let the premises, the landlady also challenged the finding of the appellate authority regarding the rejection of her claim for eviction on the ground that she requires the premises for her own use. Inasmuch as the claim of the landlady for eviction on the ground that she requires the building for her own business was negatived by the appellate authority and eviction was ordered on the other ground viz., sub-letting, the landlady could not have filed an appeal against the conclusion arrived at by the appellate authority with regard to the claim for eviction on the ground that she requires the premises for her own use. Hence the landlady is entitled to press her claim for eviction on the ground that she requires the premises for her own use and to show that the order of the appellate authority in this respect cannot be sustained. The landlady has such a right in this civil revision petition is laid down by a decision of a single judge of this Court reported in *K. Venkataramani v. S. Aravamuthan and others.*[1] Before considering the two questions that arise for decision in this revision viz., whether the landlady is entitled to an order of eviction on the ground of subletting an' on the ground that she requires the premises for her own business certain facts will have to be stated.

3. The tenant took on lease the premises bearing Door No. 38, Chitrakkara Street, Madurai for non-residential purpose and has been conducting business in jaggery for the past many years. The tenancy is as per Tamil calendar month and the monthly rent is Rs. 350 payable on or before 10th of the next succeeding Tamil month. The landlady is also the owner of the premises bearing door No. 188 East Masi Street, Madurai and the case of the landlady is that she is conducting business in palmyrah jaggery in partnership with her husband and her sons, in that prepemises. The specific case of the landlady before the Rent Controller was that she had been doing business in chillies in the premises bearing Door No. 138, Chitrakkara Street, Madurai. which is opposite to the petition-mentioned premises leased out to the tenant. It is also in evidence that as per Exhibit A-1 which is an extact from the O P register, relating to RCOP. No. 556 of 1975 on the file of the Court of the Rent Controller and District Munsif, Madurai Town, the landlady had been ordered to be evicted from the premises bearing Door No. 138 Chitrakkara Street Madurai on an application by the landlord of that premises. The order of eviction passed against she landlady in respect of the premises bearing Door No. 138, Chitrakkara Street, Madurai had been confirmed by High Court and the said order had become final. It is seen from the evidence in this case that the tenant is a leading merchant in jaggery in the petition-mentioned premises and the landlady is also doing business in jaggery and chillies in partnership with her husband and her two sons.

4. It is also in evidence that in the petition-mentioned premises a business is also carried on by a partnership firm T. Pappammal and Company in jaggery. The partners of T. Pappammal and Company are the wife and

1. (1981) 1 M.L.J 516.

the daughters-in-law of the tenant. Separate accounts are maintained for the business of the partnership firm in the petition-mentioned premises. Two name boards are found to be hanging in the petition-mentioned premises one in the name of the tenant and another in the name of T. Pappammal and Company.

5. The landlady, the respondent herein, also owned Door No.152, Chitrakkara Street, Madurai, which had been sold by her as per Exhibit A-6, dated 7th June, 1978. Though certain allegations are made by the tenant that the landlady is in possession of other non-residential premises in the city no positive proof had been let in to that effect. The case of the landlady before the Rent Controller is that she requires the petition-mentioned premises since she had been ordered to be evicted from the premises in which she is carrying on chilllies business *viz*, Door No. 158, Chitrakkara Street, Madurai.

6. The finding of the appellate authority that the tenant had sub-let the premises to T. Pappammal and Company is based upon the evidence of P.W. 1, the son of the landlady. The evidence of P.W. 1 before the Rent Controller is that the tenant had sub-let the premises to T. Pappammal and Company without the written consent of the landlady. He deposed that he did not know who Pappammal is and that he does not know whether Pappammal is the wife of the tenant. He also admits that the tenant is also in occupation of the premises and that there is no partition of the premises and separate enjoyment of any portion of the premises by T. Pappammal and Company. He also deposed that there are two name boards for both the businesses and that he has no knowledge as to whether there are separate employees under the firm T. Pappammal and Company. P. W. 1 is also not aware of any rent paid by T. Pappammal and Company to the tenant. He also denies the suggestion that T. Pappammal and Company is the sister concern of the tenant. As against this evidence the tenant who was examined as R. W. 1 deposed that he did not sub-let the premises to T. Pappammal and Company and that T. Pappammal and Company is a subsidiary firm of the tenant in which his wife and two daughters-in-law are partners and no rent is being paid by T. Pappammal and Company to the tenant. R. W. 1 deposed that there are no separate accounts or separate employees for T. Pappammal and Company and no separate portion is given to T. Pappammal and Company and that he himself is conducting the business. He also deposed that there is no separate weights and balance for T. Pappammal and Company. On this evidence the learned appellate authority came to the conclusion that the tenant had sub-let the premises to T. Pappammal and Company. The learned appellate authority came to the conclusion that the tenant had sub-let the petition-mentioned premises on the following circumstances:

> "1. The partners of T. Pappammal and Company are he third-parties in the eye of law even though they are the wif. and the daughters-in-law of the tenant;
>
> 2. The tenant himself admits of the existence of T. Pappamal and Company and that he had given credit to the goods received in excess by him in the accounts of T. Pappammal and Company.
>
> 3. The account books of T. Pappammal and Company are not produced to establish the case of the tenant that he is not receiving any rent from T. Pappammal and Company and
>
> 4. In any event since the tenant had allowed third parties to carry on a business in the petition-mentioned premises it will amount to sub-letting whether he received rent or not.

On the above said reasoning and following the dictum that there cannot be a positive proof of sub-letting by direct evidence and taking into consideration all the circumstances the appellate authority came to the conclusion that the tenant had sub-let the premises to T. Pappammal and Company and ordered eviction of the tenant on the ground of subletting. On behalf of the tenant it is contended that no portion of the premises had been sub-divided and given to T. Pappammal and Company, no rents were ever paid by T. Pappammal and Company to the tenant and the tenant retained the possession of the entire premises and that T. Pappammal and Company is a subsidiary firm and it cannot be said that there was any sub-letting by the tenant to T. Pappammal and Company. On behalf of the civil revision petitioner reliance is placed upon the following decisions in support of his case.

8. In the case reported in *Petroleum Workers' Union, represented by the General Secretary v. M/s. A. Mohamed and Company, Madras.*[1]: where the lessee, a petroleum Workers' Union allowed its sister union to conduct its meeting and thereby giving rise to a claim by the landlord for eviction on the ground of sub-letting the learned Judge observed as follows:

> "A sub-lease is a demise by a lessee for a lesser term than he himself has. Every lessee, however, short his term may be, may make a sub-lease unless he is restrained by the contract of the tenancy from sub-letting. if the demise is for the whole term or for a period beyond the term, it amounts to assignment. If the lessee divests himself he becomes a stranger to the demised property and he has no right to have possession delivered up to him. It is true that a covenant against sub-letting will restrain the assignment, but a mere covenant against sub-letting does not prohibit underletting a part of the premises, As long as the lessee remains in possession he may permit another person to use the demised premises without committing a breach of covenant, namely, not to assign, underlet or part with the possession of the demised premises."

The learned Judge also quoted with approval the following observation made in the case reported in *Peebles* v. *Crosthwaite.*[2]:

> "No doubt the executors of the lessee let the company into possession, but they did not part with possession themselves, and so long as it was true in fact that the lessees had not parted with possession they had committed no breach of the covenant."

The learned Judge also quoted with approval the observation of Romer, J., in the case reported in *Jackson* v. *Simons.*[3]: which is as follows:—

> "A covenant against assigning the demised premises, and a covenant against parting with the possession of the demised premises are therefore distinct covenants, though all belong to the same class, and if there be any other method of disposing of the demised premises that would not amount to an assignment, under-letting or parting with possession... In the same way, a covenant against sharing the possession is another distinct covenant, for, as already pointed out, a covenant against parting with possession of the demised premises is not broken by sharing the possession with another."

1. I.L.R. (1967) 2 Mad. 787: 79 L.W.103: (1966) 1 M.L.J. 356: A.I.R. 1967 Mad. 33.
2. (1897) 13 T.L.R. 198.
3. L.R. (1923) 1 Ch. 373.

The learned Judge also quoted the following passage from the case reported in *Stering* v. *Abrahams.*[1]:

> "A lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part. If there is anything in the nature of a right to concurrent user there is no parting with possession."

Eventually it was held that the lessee union permitting the other unions to conduct the meeting in the premises cannot be said to be an act of sub-letting. The tenant never parted with the legal possession of the......... premises to other unions even though they gave then permission to hold their meetings and to use the premises. In the case reported in *Vedachalam* v. *Kanniah*[2]: a single Judge of this Court observed as follows:—

> "Where a tenant with a view to expand his business enters into partnership with others in another like business and sells the goods of that partnership also along with his, there is no contravention of the rule against sub-letting under the Act. It wil be. of course, a different matter if the tenant diverts the premises to a totally different use. But this does not mean that the tenant can bring on the premises unconnected persons and allow them to trade therein and receive rents from them either as rents or as profits."

On behalf of the landlady reliance is placed upon the following cases:—

9. In the case reported in *Venkateswara Iyer* v. *Lakshminarayana Rao*[3], a single Judge of this Court observed as follows:

> "It is true that so long as the tenant retains in legal possession of the demised premises the mere appointment of a manager to run the business of the tenant will

1. L.R. (1931) 1 Ch. 470.
2. (1957) 1 M.L.J. 24 (Sh. N.)
3. (1964) 2 M.L.J. 44 (Sh N.).

not amount to sub-letting. In order to amount to sub-letting there should be a transfer of possession of the premises to the sub-tenant. But where a tenant purports to appoint a manager on the terms that the manager is to pay him a fixed sum every month irrespective of the profits of the business, it is open to the Controller to construe the document as a make-believe transaction to evade the provisions of the Madras Buildings (Lease and Rent Control) Act and an order of eviction can be passed under section 10 (2) (*ii*) (*a*) of the Madras Buildings (Lease and Rent Control) Act."

10. In the case reported in *M. Rodgers* v. *M. Prakash Rao Naidu* [1]: the tenant who was running a Press in the premises with his machinery, stopped the business and allowed his previous manager to run the business as a lessee of the machinery. The tenant had no share in the business. In considering the claim for eviction on the ground of sub-letting by the tenant Alagiriswami, J., as he then was, observed as follows:—

"The machinery cannot be run unless it is placed in the premises where it is situate. So, the lessee of the machinery also gets the advantage of the use of the business premises also. Therefore the lease amount which the lessor receives should contain in it an element of rent for the building which is used to house the machinery as well as the rent for the use of the machinery. This is mere commonsense; It is unbelievable that the lessor would take rent for the use of the machinery alone and not take any rent for the use of the business premises and agree to pay the rent himself. He should have stipulated for a lease amount which includes both the elements. It is not answer under these circumstances against the charge of subletting to say that the lessor does not take anything separately from the lessee by way of rent for the building itself or that he himself is paying the rent to the landlord and the sub-lessee is not paying the rent to the landlord."

On the abovesaid reasoning the learned Judge came to the conclusion that there was subletting. In the case reported in *The Vellore Shrof Kumaraswami Chetti Choultry by the Executive Trustee V.K. Kannappa Chettiar* v. *Veerasami*[1]., where a premises was let out for the purpose of conducting a laundry business and the tenant sublet the premises to another person for running a tea shop and in an application for eviction the tenant contended that since there was no sufficient income in the laundry business he himself started the tea shop and is conducting the same, Sadasivam, J., while coming to the conclusion that subletting was made out, observed as follows:—

"It is clear from section 10 (2) (*ii*) (*a*) of the Madras Buildings (Lease and Rent Control) Act that a tenant cannot without the written consent of the landlord transfer his right under the lease or sub-let the entire building or any portion thereof, if the lease does not confer on him any right to do so. Hence, if a tenant sub-lets even a portion of the leasehold premises it will entail liability for eviction.

It is for the landlord to establish independently his plea that the respondent has sub-let the premises.

It is difficult to get direct evidence about the sub-lease by the tenant and it is a fact which can be proved as much by circumstantial evidence as by direct evidence."

Placing reliance on the fact that the licence for the tea shop was initially obtained in the name of the third party and subsequently transferred in the name of the tenant after the proceedings were started the learned Judge came to the conclusion that there was subletting. In the case reported in *The Jamia Darus Salam Arabic College Trust by its Honorary Secretary, Kaka Haji Mohammad Omar Sahib* v. *B. Rajanna and another*[2] K. S. Venkataraman, J., while considering a case where a tenant of two rooms permitted his friend to occupy a portion of one of the two rooms let out to him and thus putting himself to the inconvenience

1. (1969) 1 M.L.J. 332.

1. (1972) I M.L.J. 184: 85 L.W. 192: A.I.R. 1972 Mad. 303.

2. (1972) 2 M.L.J. 141.

of small space for his staff and his cliente and there were separate phones and separats keys for both the tenant and the sub-tenant observed that the tenant would not have put himself to the inconvenience of limiting the space available for his staff and clients by permitting a sub-tenant to occupy a portion of the room merely on account of friendship and rents seems to have been received from the sub-tenant by the tenant though naturally it did not find a place in the accounts of either the tenant or the sub-tenant. It was held that there was sub-letting.

11. We will have to apply the tests laid down in the above said decisions to find out whether the tenant can be said to have sub-let the premises to T. Pappammal and Company. The main criterion is whether the tenant had permitted the third party to occupy the premises and had divested himself completely of the possession of the premises or a part thereof. If the tenant had permitted another person to use the premises along with him it may not amount to sub-letting. The test seems to be whether the tenant had retained the possession and control of the premises with himself. In this case T. Pappammal and Company is not put in possession of any portion of the premises and in fact there is not even a partition of the premises for the purpose of the business of T. Pappammal and Company. In the absence of exclusive possession by the partnership firm of the premises or part thereof an inference of sub-letting cannot be readily made.

12. The appellate authority seems to have been influenced by the fact that the tenant is not a partner of T. Pappammal and Company and the partners of T. Pappammal and Company are the wife and two daughters-in-law of the tenant and hence T. Pappammal and Company is a separate entity and in view of the fact that the tenant had permitted the partnership firm to use the premises it amounts to sub-letting. But the case of the tenant in that the partnership business in the name of T. Pappammal and Company has no separate establishment and the business is managed by the tenant himself. Even P. W. 1 who was examined on behalf of the landlady states that there is no exclusive possession of any part of the premises by T. Pappammal and Company and that two name boards are hanging in the premises. He also admits that he does not knew whether there is separate establishment for T. Pappammal and Company and whether T. Pappammal and Company are paying any rent to the tenant. The landlady had not adduced any evidence to show that the premises or any part thereof was put in separate possession of T. Pappammal and Company. In view of the fact that the partners are the wife and daughters-in-law of the tenant and the business is carried on by the tenant himself there is no possibility or any third-party being put in possession of any portion of the premises. Even if T. Pappammal and Company is construed technically as a separate entity the action of the tenant in merely permitting T. Pappammal and Company to carry on business in the premises without parting with the possession of the premises will not amount to sub-letting. In the case reported in *P. M. Mohideen Sahib* v. *Mohammed Habibulla Sahib*[1] the following observation is made:—

> "The mere fact that another is allowed to use the premises when the lessee retains legal possession is not enough to create a sub-lease. The ratio adopted by the learned and eminent Judges is based upon the well-known principle that subletting is not to be considered in the abstract but, has to be viewed with reference to the positive facts appearing in each case. The essential *sine qua non* to view a particular act of the tenant as sub letting is parting with physical or legal possession of the demised premises. If there is parting with physical possession without authority the position is obvious. But if the premises demised is used by another by licence, then naturally legal squabbles come in, whether there was physical or legal parting, of possession or not. Here again, as justice should not be bereft of common sense and as the later is the governing factor in all activities, including a legal activity, one should consider whether putting up of a sign board by the lessee without the permission of the landlord tantamounts to, or as the lower appellate tribunal said deemed to be, sub-letting.

The Court does not agree with the appellate Court that there is any such fiction,

1. (1975) T.L.N.J. 53.

in the instant case. The question is whether permitting a person to put up a sign board in the demised premises would tantamount to parting with legal possession of the premises. It is not denied, nor can it be, that the lessee always retained control over the demised premises and he was constantly on the premises and kept it under his exclusive possession. The mere use of a portion of the premises, while the lessee retained juridical possession of the demised premises is not to create a sub-lease. The lower Court was, therefore, wrong in having opined that permitting a sign board to be kept in the demised premises would fictionally be subletting."

Applying these principles to the present case it is clear that the conclusion of the appellate authority which is based on the narrow technical view that legally T. Pappammal and Company is a separate entity and that will amount to sub-letting cannot be sustained. The evidence of the tenant that the business of T. Pappammal and Company is managed by him had not been controverted and as such on facts we cannot come to the conclusion that there is any transfer of possession of the premises or part thereof by the tenant to any third party. The inference drawn by the appellate authority based upon the non-production of the accounts of the tenant and that of T. Pappammal and Company also does not appear to be correct. Even P.W. 1 does not say anything about the payment of rent by T. Pappammal and Company to the tenant. If the partners of T. Pappammal and Company are not the dependants of the tenant but third parties. there may be some force in such an argument. In this case the evidence of the tenant that he is looking after the business of T.Pappammal and Company is not controverted by P. W-1 and as such no parting of physical possession by the tenant in respect of the premises is made out. There is no transfer of the possession of the premises or a part thereof to any third party. The mere exhibition of name board of T.Pappammal and Company will not amount to transfer of possession of the premises. Applying the principles laid down in the above decisions the only conclusion that can be arrived is, the sub-letting alleged by the landlady is not made out. The finding of the appellate authority cannot be supported in this regard. Hence the order of eviction passed on the ground of sub-letting by the appellate authority cannot be sustained.

13. The second ground on which the eviction was prayed for by the landlady is under section 10 (3) (*a*) (*iii*) that the required the non-residential building for the purpose of a business which she is carrying on. The relevant section which enables the landlady to claim a non-residential premises for his own occupation is as follows:—

"10 (3) (*a*). A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the buildings (*iii*) in case it is any other non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on, a non-residential building in the city, town on village concerned which is his own:

Provided that a person who becomes a landlord after the commencement of the tenancy by an instrument *inter vivos* shall not be entitled to apply under this clause before the expiry of three months from the date on which the instrument was registered:

Provided further that where a landlord has obtained possession of a building under this clause he shall not be entitled to apply again under this clause—

(*i*) in case he has obtained possession of a residential building, for possession of another residential building of his own;

(*ii*) in case he has obtained possession of a non-residential building, for possession of another non-residential building of his own."

14. It is urged on behalf of the tenant as per the above section the landlady is not entitled to claim an order of eviction since she is already in possession of the premises bearing door No. 188, East Masi Street, Madurai in which she is carrying on business in chillies and palmyrah Jaggery. Reliance is placed upon the following decision on behalf of the tenant in support of his contention:

15. In the case reported in *M/s. Clamour Saree Museum and other* v. *The Tamil Nadu Handloom Weavers, Co-operative Soceity Limited, Madras, represented by its BusinessManagerm*[1] Veeraswamy J., as he

1. (1969) 2 M.L.J. 493.

then was, while considering the claim of the landlord under section 10 (3) (*a*) (*iii*) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) observed as follows:—

"By the language employed in section 10 (3) (*a*) (*iii*) it is clear that if a landlord is carrying on a business in a non-residential premises of his own that will be a bar to his obtaining an order of eviction in respect of another premises. It does not appear to be the intention of the provision that the test is every business is considered separately. It is not as if that if a landlord is having several businesses and is occupying a non-residential premises of his own in which he is carrying on one of the businesses, he is permitted by the provision to get possession of other non-residential premises of his own for carrying on every one of the other businesses."

Relying on the above decision it is contended on behalf of the tenant that since the landlady is already in possession of Door No. 188, East Masi Street, Madurai in which she is carrying on business, she is not entitled at evict the tenant.

16. On behalf of the landlady reliance is placed upon a Division Bench decision of the Andhra Pradesh High Court in the case reported in *B. Balaiah* v. *Chandoor Lachaiah*,[1] where it was held that a father-cummanager of a joint Hindu family, who is in occupation of a non-residential building, is entitled to ask for eviction of a tenant under section 10 (3) (*a*) (*iii*) from another non-residential building belonging to the family in the same city on the ground that his undivided major son requires it for carrying on his business. In the course of the judgment the Division Bench observed as follows:—

"We are, therefore, of the clear opinion that what the said provision means is this: When a landlord, who is in occupation of a non-residential building in a city, town or village requires another non-residential building of his own in the same city, town or village, as the case may be, from his tenant, for the purposes of the business which he is carrying on—which can mean shifting or expansion of the business which he is carrying on or for commencing a new business - can successfully claim eviction of his tenant if he is able to satisfy the Rent Controller that the non-residential building which he is occupying is not sufficient or suitable for the purpose of expansion of his business or for the purpose of a new business which he *bona fide* proposes to commence, or that the shifting of his business has, in the circumstances of the case, become inevitable. It would be open to him to prove that the non-residential building which he is occupying is not exclusively his own or that he is not entitled to its exclusive possession."

Following that above Division Bench decision, a single Judge of the Andhra Pradesh High Court in the case reported in *Kollisetti Venkaiah* v. *Tadikamalla Satyanarayana*[2] observed as follows:

"In the decision in *Balaiah's case*[3] the learned Judges have carefullyconsidered the entire matter from all aspects and came to the conclusion that having regard to the scheme of the Act, it would not have been the intention of the Legislature that a landlord under no circumstances can require a non-residential building of his own if he is already occupying a non-residential building of his own, in the same city, town or village. With great respect to the learned Judges, in my opinion, that is the correct view to be taken in interpreting the provision contained in section 10 (3) (*a*) (*iii*) of the Act."

This view of the Andhra Pradesh High Court that a landlord who is in possession of a non-residential building of his own can ask for eviction of the tenant on the ground that he requires the premises for the expansion of his existing business or starting a new business by him or the members of his family is not approved by our High Court In the case reported in *Easwaran Chettiar* v. *K. Subbarayan*[3], a Division Bench of this Court dissented from the view expressed by the Andhra Pradesh High Court and observed as follows:

1. (1965) 2 An. W.R. 95: A I R. 1965 A.P. 435.

1. A.I.R. 1972 A.P. 123.
2. (1965) 2 An. W.R. 95: A.I R. 1965 A.P. 435,
3. (1970) 83 L.W. 696: A.I.R 1971 Mad. 163.

"In case a landlord requires a non-residential building within the meaning of section 10 (3) (*a*) (*iii*) of the Act, which is in the occupation of his tenant, then he or his son should not be in occupation of non-residential building of his own, for purposes of a business which he or his son is carrying on. The meaning of this section is clear and there is no grammatical impropriety if such meaning is given effect to.

If a person, therefore, is occupying a non-residential premises of his own and is carrying on a business in it, then he has no right to disturb a tenant of his in another building and ask for his eviction. The niceties and artificialities of a problem where the non-residential building owned by the landlord is sufficient for the business which he is carrying on does not enter the field of discussion, because they are alien..................................

The law as it stands says that the landlord is interdicted from seeking a non residential building of his in the occupation of his tenant if and when he is already in such a non-residential building of his own in which he is carrying on a business."

In the course of the Judgment the Division Bench also observed as follows:—

"The office of the Judge is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious.'

"The Court, therefore, is not expected to play the role of a legislator and interpret law in such a way so as to expand its scope of activity on purely equitable considerations, for it would be transgressing limits of its function, which is only to declare law and not to make it. Closely allied with this fundamental concept of interpretation is the doctrine explained in the maxim a *verbia legis non-recedendum est* (from the words of the law there should not be any departure). It is well accepted as a golden rule of interpretation that the ordinary meaning of the words used by the statute and the grammatical sense thereof should be adhered to. It is therefore necessary to look into the words employed by the Legislature in section 10 (3) (*a*) (*iii*) to find out what its grammatical and plain meaning is. The view expressed by the Andhra Pradesh High Court that when the Legislature intended that a landlord who is doing business in a portion of the premises belonging to him is entitled to evict the tenant in the other portion of the premises under section 10 (3) (*c*) on the ground the portion occupied by him is not sufficient for his business, it would not have been the intention of the legislature to negative the right of the landlord carrying on business in a premises of his own, to evict a tenant from another non-residential premises of his own on the ground that the premises in which he carried on business is not sufficient for his business or that he required the premises for the non-residential use of any other member of his family, had not been followed by the Division Bench of this Court.

Hence the law as far as we are concerned is that a landlord who is carrying on business in a non-residential building of his own cannot ask for eviction of the tenant in another non-residential building either on the gtound that the building in which he is carrying on his business is not sufficient or on the ground that he wants to start a new business by himself or by the members of his family. Mr. Paul Pandian, learned counsel appearing for the respondent (landlady) contends that the view expressed by the Division Bench will not be applicable to the facts of the present case for the following reasons:—

1. In this case the landlady carried on the business in palmyrah jaggery in partnership with her husband and her sons in door No. 188, East Masi Street, Madurai which is a non-residential building belonging to her;

2. The landlady is carrying on another business in chillies in door No. 138, Chitrakkara Street, Madurai, from which premises she is ordered to be evicted by an order of the Court"

In this connection the learned counsel points out that the two businesses carried on by the landlady in both the above said premises are distinct and separate as borne out from the following facts:

"(*a*) As per Exhibit A-2 licence is given for carrying on the business in dried chillies மிளகாய் வத்தல் in Door No. 138 Chitrak-

kara Street, Madurai and as per Exhibit A-5 licence is given for business in palmyrah jaggery கருப்புக் கட்டி in door No. 188, East Masi Street, Madurai. (b) There are also separate commercial tax assessments in respect of Pandia Nadar firm carrying on Chillies business in Door No. 138, Chitrakkara Street, Madurai as evidenced by Exhibits A-8 and A-13.

(c) The fact that a separate business in chillies has been carried on in Door No. 138, Chitrakkara Street, Madurai is evidenced by the delivery notes Exhibits A-9 and A-10.

(d) The fact that separate chillies business has been carried on by the landlady in Door No. 138, Chitrakkara Street, Madurai is also borne out by the certificate of verification issued by the Inspector of Labour as per Exhibit A-11 which shows that the premises has been used for business in dried chillies."

The contention of the learned counsel for the respondent is that these circumstances clearly show that the landlady is carrying on a separate business in Door No. 138, Chitrakkara Street, Madurai unconnected with the business carried on in Door No. 188, East Masi Street and the same was not taken note of by the appellate authority and hence the appellate authority erred in observing that same business has been carried on in Door No. 188, East Masi Street and in Door No. 138, Chitrakkara Street. In view of the evidence in the case and the several circumstances detailed above the finding of the appellate authority that the business carried on in Door No. 138, Chitrakkara Street is not different from the business carried on in Door No. 188, East Masi Street, cannot be said to be based on a correct appreciation of the evidence. The case of the landlady is that since the business being carried on by her in Door No. 138, Chitrakkara Street, is a separate business, the fact that she is ordered to be evicted from the premises where she is carrying on business is sufficient ground for claiming another non-residential premises to locate the business carried on in Door No. 138, Chitrakkara Street, Madurai. It is also the case of the landlady that in any event even if the business in the same goods in carried on in both the places, the business carried on in Door No. 188, East Masi Street, Madurai should be viewed as a separate business since it is a separate entity altogether. In short the argument on behalf of the landlady is that the business carried in Door No. 138, Chitrakkara Street, Madurai will amount to a business itself and as such the landlady is entitled to ask for eviction of the tenant in the petition-mentioned premises to house the business carried on in Door No. 138, Chitrakkara Street, Madurai. Even if the business carried on in Door No. 138, Chitrakkara Street Madurai, can be termed as a branch of her business which is carried on in Door No. 188, East Masi Street, Madurai, the business carried on in the branch will have to be viewed as a separate business. The phrase "Business" occurring in section 10 (3) (a) (iii) will refer to only a physical entity and the same will have to be borne in mind in interpreting the phrase "a business." On a proper construction of "a business which the landlord or any member of his family carrying on "occurring in section 10 (3) (a) (iii) will include a business carried on in a branch also. Hence a landlord occupying two premises for non-residential purposes if he is evicted from one of such premises he is entitled to ask for possession of another non-residential building of his own. This proposition came up for consideration before a Division Bench of thi Court in the case reported in *V.R. Jayaraan v. N.S. Ramalingam*,[1] and the Division Bench observed as follows:

"But the Court is of the opinion that the fact that the petitioner is carrying on business in jewellery in a building of his own does not really disentitle him to relief under section 10 (3) (a) (iii) of the Act, though in this case the petitioner has to fail on other grounds. The appellate authority and the revisional authority have not correctly understood the purport and scope of the decision in *M/s. Glamour Saree Muslum v. T.N. H.W. Co. op. Society*.[2] The observation of the learned Judge—"what the sub-section provides is that the carrying on of the business by the landlord in his own non-residential building is the test, and that does not, in the view of the Court, mean each business or a particular business. The phrase "a business" in the provision has reference to any business and not each of the businessess" has to be understood in that context. The learned Judge held that if the landlord was carrying on co-optex saree business in the Pantheon Road building,

1. (1973) T.L.N.J. 393.
2. (1969) 2 M.L.J. 493.

which is its own, it will not be entitled to an order of eviction. That is because on the plain reading of section 10 (3) (*a*) (*iii*) a landlord who is carrying on a particular business in a building of his own would not be entitled to relief under that provision in respect of the same business. *But, if the landlord is carrying on a different business in another building which is not his own, there is nothing in the section which debars him to have recourse to the provisions in that section in respect of that business, even though he might be carrying on another business in a building of his own.* In other words, if a landlord is carrying on two different businesses, one say in jewellery, in a building of his own, and the other, say in timber, in a rented building, he would be entitled to relief under section 10 (3) (*a*) (*iii*) for shifting the timber business to a third building which is his own but in the occupation of a tenant. In such a case the timber business of the landlord in the rented building satisfied the clause "a business which he..... in carrying on' occurring in the above section. This is in accord with the view taken by a Division Bench of this Court in *Ramalinga Mooppanar* v. *Narayana Iyer*[1] In the present case, the landlord is carrying on business in jewellery in a building of his own. If the business, Ranga Medicals which is being carried on in 61, Long Bazaar, a rented building, is a business of the landlord himself the Court sees no ground at all to say that the landlord would not be entitled to apply for eviction of a tenant from the premises in question under section 10 (3) (*a*) (*iii*)"

The same question also came up for decision before a single Judge of this Court in *J. N. Gulamali and others* v. *Howrah Casting Company, Madras and another*[2] where a landlord carrying on a business in a non-residential building of his own, applied for the eviction of a tenant from a non-residential building belonging to him for the purpose of locating another business of the landlord carried on in a rented premises. The tenant who resisted the claim for eviction relied on the decision of a single Judge of this Court reported in *Glamour Saree Museum* v. *Tamil Nadu Handloom Weavers Cooperative Society*[1] and the decision of a Division Bench of this Court reported in *Eswaran Chettiar* v. *Subbaraya*[2] where it had been laid down that a landlord conducting business in a non-residential premises of his own is not entitled to come forward with an application for evicting a tenant on the ground that the premises of the landlord is not sufficient for the business or that the landlord required the premises for starting a different business for himself or any other member of his family. The learned single Judge observed that a distinction will have to be made in the case of distinct business, carried on by the landlord in a rented premises in addition to the business carried on by the landlord in his own premises. Following the reasoning of the Division Bench in *V.R. Jayaram* v. *N.S. Ramalingam*,[3] the learned single Judge summarised the legal position as follows:—

"The observation of a Division Bench of this Court in *Eswaran Chettiar* v. *Subbarayan*[2] that the letter 'a' in section 10 (3) (*a*) (*iii*) would mean 'any' and that would be its plain meaning, has also to be understood on the facts of that case. If the landlord is carrying on the particular business in his own building, he cannot be heard to say that he required the premises in the occupation of the tenant for shifting that business. The mere fact that in the building, belonging to the landord, not only the particular business but another business was also being carried on, would not mean that the landlord would be entitled to relief under section 10 (3) (*a*) (*iii*) of the Act. But, on a plain meaning of the said provision, if the landlord is carrying on business in a building not his own, he would certainly be entitled to relief under the said provision, albeit, he is carrying on another business in a different building which is his own. The only limitation is, the claim of the landlord should be *bona fide*, and under the said provision, the landlord can obtain possession of only one building."

1. C.M.P. No. 4164 of 1950 - (1951) 1 M.L.J. (N.R.C.) 7.
2. (1978) 91 L.W. 136.

1. (1970) 83 L.W. 13.
2. (1970) 83 L.W. 696: A.I.R. 1971 Mad. 153.
3. (1973) T.L.N.J. 393.

"The legal position will boil down to this: Does the landlord seek eviction of the tenant from a non-residential building belonging to him with reference to a business, which he is carrying on in a rented premises? If that be so, section 10 (3) (*a*) (*iii*) would apply, albeit he is carrying on another business either individually or in partnership in the non-residential premises owned by him. This interpretation is in accordance with the object of the Act, *viz.*, this is not a case of unreasonable eviction. It will be rather very reasonable for a landlord to have his business which is of a different nature in the premises, owned by him, rather than suffer the tenancy for all time to come, merely because he happens to be a partner in some other business which is being carried on in portion of that a non-residential premises."

17. In my view the learned single Judge had rightly interpreted section 10 (3) (*a*) (*iii*) in the light of the earlier decision of this Court in arriving at the conclusion that a landlord carrying on a business in a rented premises can file an application for evicting a tenant of a non-residential building for locating the business which the landlord is carrying on in the rented premises even though the landlord is carrying on another business of his own in a premises of his own. In the present case as already observed there is abundant evidence to show that the business carried on in Door No. 138, Chitrakkara Street, Madurai is altogether a different business from the one carried on Door No. 188, West Masi Street, the landlady is entitled to evict the tenant in occupation of Door No. 138, Chitrakkara Street, Madurai, for her business which she is carrying on in Door No. 138, Chitrakkara Street, Madurai, a premises she had taken on rent and from which she is ordered to be evicted. In any event even if it is found that the business carried on in Door No. 138, Chitrakkara Street is a branch of the business carried on in Door No. 188, West Masi Street even such a branch will come with the ambit of "a business" which the landlady is carrying on and in view of the fact the landlady in the present case is ordered to be evicted from the premises bearing Door No. 138, Chitrakkara Street, in which she is carrying on the branch business, she in turn is entitled to evict the tenant in the premises bearing Door No. 138, Chitrakkara Street for the purpose of locating the branch of the business carried on by the landlady in Door. 138, Chitrakkara Street.

18. In the result the order of eviction passed by the appellate authority will have to be sustained though for a different reason. Hence the civil revision petition is dismissed. There will be no order as to costs. In view of the fact that the business carried on by the tenant in the petition-mentioned premises is an established one, one year time is granted to the tenant for delivery of possession to the landlady.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

The State of Tamil Nadu, represented by the Revenue Secretary to the Government of Tamil Nadu, Fort St. George Madras-9 .. *Appellant**

v.

K. M. Pichai Ammal and others .. *Respondents.*

(A) *Madras Estates Land Act (I of* 1908), *section* 3 (15) *and* (16)—*Madras Estates Communal Forest and Private Lands (Prohibition of Alienation) Act (XIV of* 1947), *sections* 4 (1) (3) *and* 14.

(B) *Forest Act (XVI of* 1927), *section* 1.

(C) *Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of* 1948), *section* 12—*Suit for declaration — Plaintiff claiming to be owner of kudiwaram interest in suit lands—Suit lands assigned to plaintiff by the Zamindar out of Zamin lands—Zamin taken over by the State Government on 3rd January,* 1951 *under the Tamil Nadu Act XXVI of* 1948—*Suit lands classified as forest lands — Plaintiff applying for ryotwari patta to the State—Application rejected on the ground suit lands were forest lands—Suit by plaintiff — Trial Court decreeing the suit as prayed for and lower appellate Court confirming the decree—Second appeal by Government —Suit lands held to be forest lands and plaintiff not entitled to ryotwari patta.*

The first plaintiff took a large extent of land on assignment from a Zamindar on payment of 'Nazir' under assignment order, dated 31st December, 1945. The Zamin estate was taken over by the State Government on 3rd January, 1951, under the Tamil Nadu Act XXVI of 1948. The suit lands were classified as forest lands under the Forest Act by the State Government during survey and settlement. The first plaintiff applied to the State Government for the issue of ryotwari patta and this was rejected on the ground that the assignment was not valid in law. Thereafter the first plaintiff filed a suit for declaration and succeeded in the Courts below.

On second appeal to the High Court by the State Government,

Held, at the time of the assignment, the lands were not ryoti lands but were forest lands and therefore, the land-holder had no right to assign the lands. The fact that after some reclamation, a portion of the lands had been subsequently, brought under cultivation cannot mean that on the date of the assignment, the lands were cultivable. The relevant date for considering whether the lands were forest lands or ryoti lands was the date of assignment. In view of the finding that the suit lands were not ryoti lands, the first plaintiff would not be entitled to get ryotwari patta for the same. [*Paras.* 14, 15, 18.]

Though the order of assignment of the lands in question in the instant case is of the year 1945, for the purpose of determining the character of the land the definition of 'forest land' occurring in the Madras Estates Communal Forest and Private Lands (Prohibition of Alienation) Act (XIV of 1947) is material. Though the Act came into force on 27th June, 1947, section 4 (1), (3) of the Act invalidates any transaction in relation to forest land exceeding 20 acres entered into before that date. [*Para.* 17.]

Cases referred to:—

Raja of Venkatagiri v. *Ayyapareddi,* (1915) I.L.R. 38 Mad. 738: 25 M. L. J. 578; *Subbayya* v. *Sree Raja Venkataramiah Apparao Bahadur,* (1924) 47 M. L. J. 469: 19 L.W. 626: A.I.R. 1924 Mad. 832; *Athmanathaswami Devastanam* v. *Gopalaswami,* (1964) 1 M. L. J. (S.C.) 42: (1964) 1 An.W.R. (S.C.) 42: (1964) 1 S. C. J. 105: (1964) 3 S.C.R. 763: A.I.R. 1965 S. C. 338; *Naganna Naidu* v. *Pitchayya,* L.R. 56 I.A. 346: (1929) I.L.R. 52 Mad. 797: 57 M.L.J. 654: 30 L.W. 435: A.I.R. 1929 P.C. 249.

Appeal against the decree of the District Court, Madurai, dated 15th November, 1976, in Appeal Suit No. 73 of 1976, preferred against the decree of the Court of the Subordinate Judge, Dindigul in Original Suit No. 72 of 1970.

*S.A. No. 320 of 1979.
22nd October, 1981.

The Additional Government Pleader, for Appellant.

P. Jayaraman, for Respondent.

The Court delivered the following

JUDGMENT.—The State of Tamil Nadu, the defendant in O.S. No. 72 of 1970, on the file of the Sub-Court, Dindigul, is the appellant herein.

2. The father of the respondents filed the said suit for a declaration that he is the owner of 'kudiwaram' interest in the suit lands which were originally 'Zamin Tharisu Punja' in patta No. 401 bearing Paimash No. 358 corresponding to S. No. 869 measuring 704-88 acres situated in Sirumalai Village, Nilakottai Taluk which was originally in Ammayanaickenur Zamin, and for a permanent injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the same. His case as set out in his plaint was as follows:—An extent of 851 'kulis' (502.09 acres) was assigned on payment of 'nazir' at the rate of one 'panam' per 'kuli' by the erstwhile Zamindar of Ammayanaickenur by means of an assignment order dated 31st December, 1945, and the plaintiff was in possession of the same. Patta No. 401 was also issued by the Zamindar in pursuance of the said order of assignment. The Ammayanaickenur Zamin was taken over on 3rd January, 1951, under the provisions of Tamil Nadu Act XXVI of 1948. At the time of the assignment, the lands were registered as dry waste. The same could be cultivated if reclaimed and the bushes and shrubs are cleared. As the lands were ryoti and as the same have been assigned by the Zamindar to the plaintiff, the plaintiff has become a ryot. The assignment was also *bona fide* having been made for valid consideration. The plaintiff applied for ryotwari patta under the said Act. But the defendant refused to grant ryotwari patta on the ground that the assignment was not valid in law and as such no right flowed therefore to the plaintiff. The said refusal of the patta was unjustifiable and against law. The plaintiff filed W.P. No. 1723 of 1967 in this Court and that was dismissed by the Court with a direction to the plaintiff to file a suit to establish his title. Though the assignment was only for 851 'kulis' (502.09 acres), as a result of the survey carried out after the taking over of the estate, the lands assigned have been found to be 704-28 acres. Therefore, the plaintiff is entitled to a declaration that he is the owner of the suit properties and that the defendant has no right to interfere with his possession and enjoyment of the same.

3. The defendant resisted the suit contending *inter alia* that the lands in question were not ryoti lands but forest lands at the time of the assignment, and therefore, the assignment itself was invalid besides its being not *bona fide,* that therefore, the patta was rightly refused to the plaintiff by the defendant, that the plaintiff was not in continuous possession for over 12 years from the date of the notification so as to claim himself to be a ryot within the meaning of the Estates Land Act, 1908, and that in any event, the suit being in substance for a ryotwari patta under the guise and plea of title and injunction, the civil Court has no jurisdiction to entertain the suit. Even otherwise the suit is barred by section 65 of the Tamil Nadu Act, XXVI of 1948.

4. Pending the suit, the only plaintiff died and his legal representatives have been impleaded as plaintiffs 2 to 9.

5. The trial Court held after considering the evidence adduced by the parties at the time of trial that the suit lands are ryoti lands, that the plaintiff was a ryot, that the assignment by the Zamindar of Ammayanaickenur in 1945 was *bona fide* and for valuable consideration, and that the suit which is one for declaration of title and injunction is maintainable. In that view, the learned District Munsif decreed the suit as prayed for with costs. The defendant took the matter in appeal to the lower-appellate Court, and the lower appellate Court set down the following two questions for consideration:—

> "1. Whether the assignment made by the Zamindar in favour of the plaintiff was *bona fide* and for valuable consideration?
>
> 2. Whether the plaintiff was entitled to the declaration and injunction sought for in the suit?"

6. On the first point, the lower appellate Cort held that the assignment is *bona fide* and for valuable consideration, and on the second point, that the suit for declaration of title and injunction is not barred by the provisions

of the Tamil Nadu Act XXVI of 1948. This second appeal filed by the State against concurrent decisions of both the Courts below has been admitted on the following substantial question of law:—

> "Whether the Courts below were right in decreeing the suit when the assignment itself was made subsequent to the Estates Abolition and Conversion into Ryotwari Act?"

7. From the pleading set out above, it is seen that the substantial controversies between the parties in the second appeal are: (1) whether the suit properties were ryoti lands or forest lands on 31st December, 1945, when the Zamindar assigned the lands in favour of the plaintiff, and if the lands are forest lands, is the assignment from the Zamindar valid; and (2) whether the suit is barred by the provisions of the Tamil Nadu Act XXVI of 1948. Though the assignment in question was attacked as not being *bona fide* the truth of the assignment has not been questioned before me by the appellant.

8. On the first question, the trial Court had expressed the view that the lands at the time of the assignment had been classified as 'Zamin Tharisu Punjai', that even the order of assignment described the lands as 'Zamin Tharisu Nilam', that though the lands were full of thorns and shrubs, they could be cultivated after reclamation, that the lands being cultivable lands, they should be taken to be ryoti lands, and that the lands being ryoti, the Zamindar had the power to assign the lands to the plaintiff. The lower appellate Court has also agreed with the trial Court and held that the lands assigned were cultivable lands, and therefore the Zamindar could validly assign the same. The concurrent view taken by the Courts below as to the nature of the lands has been challenged by the appellant. In this connection, the appellant also puts forward a plea that once the character of the lands has been decided by the authorities constituted under the Tamil Nadu Act XXVI of 1948, the civil Court cannot go behind that classification and hold that the lands are of a different nature and character.

9. On the second question regarding the jurisdiction of the civil Court to entertain the suit, both the trial Court and the appellate Court have held that the suit as framed being one for declaration of title and for injunction is not barred by the provisions of Tamil Nadu Act XXVI of 1948. That view also has been challenged by the appellant.

10. Thus the first question that arises for consideration in this appeal, is whether the suit properties are ryoti in character as held by the Courts below. The suit properties situated in Sirumalai Village, Nilakottai Taluk and classified as 'Zamin Tharisu' originally belonged to one K. Rangasami Naicker, Zamindar of Ammayanaickenur, Dindigul Taluk. Under Exhibit B-1 dated 31st December, 1945, he had assigned an extent of 851 'kulis' (502.09 acres) after collecting 'nazir' amount at the rate of one 'panam' per 'kuli'. After the assignment, patta bearing No. 401 was issued to him, he was paying kist for his 'kudiwaram' interest not only to the erstwhile Zamindar but also to the defendant after the estate was taken over on 3rd January, 1951, under the provisions of Tamil Nadu Act XXVI of 1948. The extent assigned was stated to be 502.09 acres within four stated boundaries. At the time of survey and settlement, the area within the four boundaries mentioned in the assignment deed was found to be 704.88 acres. At the time of the assignment, the lands had been registered as dry waste and in the Zamin records they were shown as 'Zamin Tharisu'. The assignment deed itself refers to the suit property as a jungle full of thorns, shrubs, etc. The relevant recital in the document in Exhibit B-1 is as follows:—

> "செடிகளும், கற்களும், சரளைகளும், முட்களும், அடர்ந்த காடுகளாகவும், வனாந்தரங்களாகவும் இருப்பதால் ஏராளமான பணச் சிலவு செய்தும், பிரயாசை எடுத்து சீர்திருத்தி சாகுபடிக்குகொண்டு வரவேண்டியிருக்கிற சிரமத்தை உத்தேசித்து ஷை நிலத்துக்கு ஷை கிராமம் கர்ணத்துக்கு உத்தரவு செய்திருக்கிறது."

The recitals in Exhibit B-1 also make it clear that no portion of the property assigned was actually being cultivated. It is in evidence that after the assignment, a small portion of the extent assigned has been brought under cultivation after reclamation, but not the entire extent. Except the extent shown to have

been cultivated, the rest of the extent remains still a jungle. After the estate was taken over and during the survey and settlement, the suit lands had been classified as forest lands and a notification under the Forest Act has also been issued declaring the lands as forest lands.

11. Section 3 (15) of the Madras Estates Land Act, 1908, defines a ryot as follows:—

"Ryot means a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the land-holder the rent which is legally due upon it. (*Explanation*:—A person who has occupied royti land for a continuous period of twelve years shall be deemed to be a ryot for all the purposes of this Act)".

12. Section 3 (16) which gives definition of "ryoti land" is as follows:—

"Ryoti land means cultivable land in an estate other than private land but does not include,

(*a*) beds and bunds of tanks and of supply drainage, surplus or irrigation channels;

(*b*) threshing floor, cattle-stands, village sites, and other lands situated in any estate which are set apart for the common use of the villagers;

(*c*) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists".

13. The definition of "ryoti land" will include all cultivable lands in an estate other than private land. "Forest land" has been defined under section 3 (*b*) of the Madras Estates Communal, Forest and Private Lands (Prohibition of Alienation) Act, 1947, as under:—

"Forest land includes any waste land containing trees and shrubs, pasture land and any other class of land declared by the (State) Government to be forest land by notification in the Fort St. George Gazette".

14. It is the case of the appellant that the lands having been classified and shown as "Zamin Tharisu" "Zamin waste" even at the time of the assignment of the lands and the lands being full of trees, shrubs and thorns they may *prima facie* fall within the above definition of "forest land". The assignment deed itself proceeds on the basis that the waste lands which are full of shrubs, stones, mounds and thorns are being alienated because it will involve huge expenditure for reclamation so as to bring them for cultivation, and the land-holder is not in a position to do it. The lands were not actually cultivable on the date of the assignment. Having regard to the nature and description of the lands in the assignment deed Exhibit B-1, they will fall within the definition of "forest land"; on the date of assignment. The fact that after some reclamation, a portion of the lands has been subsequently brought under cultivation cannot mean that on the date of the assignment, the lands were cultivable. According to the learned counsel for the respondents, a land which could be brought under cultivation after making reclamation should be taken to be cultivable land and that merely because the land was originally shown as "Tharisu" or classified as "waste land", it cannot be taken to be non-ryoti. Apart from the intrinsic evidence found in Exhibit B-1 that the lands assigned thereunder were waste lands with full of trees, shrubs, thorns, stones and mounds requiring a huge amount of money and labour for reclamation, D.W. 1 who is a Forester has deposed that the suit land is a forest, and there are valuable trees such as 'Vekkali', 'Vengai', Savukkai', 'Kadukkai', Nelli', 'Thethegathi', etc. However, this evidence has been ignored by the trial Court on the ground that even though there may be valuable trees as pointed out by D.W. 1, there is no evidence of thick forest. Page 58 of the 'A' Register for Sirumalai village has been marked as Exhibit B-19, and it shows that S. No. 869 has been classified as 'காடு" This also has been ignored by the trial Court on the ground that the mere use of the word "காடு" in the register in the absence of any other acceptable evidence would not conclusively show that the suit property, S. No. 869, is a forest or forest land.

15. Having regard to the fact that though the Madras Estates Land Act or the Madras Estates Abolition and Conversion into Ryotwari Act, have not defined "forest land", the definition of "forest land" in Tamil Nadu Act XIV of 1947 which preceded Madras Act XXVI of 1948, can be looked into. Having

regard to the object of the Madras Act XIV of 1947, which is to prevent the alienation of communal, forest and private land in an estate pending the abolition of Zamindaries, the definition of "forest land" occurring therein can be taken to find out what are the lands the erstwhile Zamindar could not alienate. That definition includes any waste land containing trees and shrubs. In this case the assignment deed Exhibit B-1 would clearly show that the lands assigned are waste lands full of shrubs trees, thorns, stones and mounds. The document Exhibit B-1 also indicates that the motive for assignment is the huge expenditure involved for making them cultivable. Thus, as on the date of the assignment Exhibit B-1, the lands were hilly tracts full of trees, shrubs, thorns, stones and mounds and were not as such cultivable. It is true that after spending considerable amount for reclamation, they could be made cultivable. But if that were to be the test, then even the bed of tank, or bed of sea could be reclaimed and made cultivable after incurring a huge expenditure. On that ground we cannot say a tank bed or sea bed is a cultivable land. The trial Court has proceeded on the basis that the State Government has not shown the lands as forest lands in the revenue accounts. But Exhibit B-16 has been produced by the defendant which is a copy of the communication emanating from the Special Deputy Collector (Forest Settlement), Madurai, dated 31st May, 1971, showing that the lands have been classified as forest lands. Apart from this, the 'A' Register of the village, Exhibit B-19 also shows that the land has been classified as "காடு" meaning "forest". Apart from this, as already stated, there is intrinsic evidence in Exhibit B-1 itself that the lands assigned are "வனந்திரங்கள்" meaning "forests". The Courts below have held without jurisdiction that much significance cannot be attached to the word "வனந்திரங்கள்" occurring in Exhibit B-1. Apart from this, the admission of the authorised Manager of the first plaintiff before the Special Deputy Tahsildar, Madurai in his statement under Exhibit B-13 that the suit lands are not accessible even to the pedestrians and it is not possible to climb the hill and reach the lands for the purpose of cultivation or horticulture, that the lands are 7 miles away on the hill from the foot of the hill, would clearly indicate that the lands are forest lands covering a hill tract which cannot be approached even by pedestrians. This admission has also been wrongly ignored by the lower Court on the ground that the admissions by themselves will not show that the property is a forest land. According to the lower Court, since the suit property relates to a large extent of land, the presence of trees and uncultivable portions will not itself take away the ryoti character of the land and make it a forest land. The trial Court, however, in making that observation overlooks the fact that no portion of the area covered by Exhibit B-1 was shown to be cultivable at the time of the assignment. It may be that after the assignment and with a view to get patta for the lands, the first plaintiff could have brought some portion of the lands under cultivation after incurring a considerable expenditure. But the relevant date for considering whether the lands were forest lands or ryoti lands was the date of assignment.

16. The ryoti land as per the definition is a cultivable land in an estate. In *Raja of Venkatagiri* v. *Ayyapareddi*[1], a Bench of this Court had held that a cultivable land is permanently cultivable for all practical purposes and it is not land which might be occasionally cultivated. In the course of its judgment, the Bench had referred to section 6 (2) of the Madras Estates Land Act, 1908, and had observed that waste land let under a contract for pasturaging cattle in any reserve forest or for cultivation of agricultural crops cannot, by means of such pasturaging or temporary cultivation, become a ryoti land. Section 6 (2) of the said Act provides that occupancy rights shall not be conferred on persons who are admitted into waste land under contract for pasturaging cattle or admitted into land reserved *bona fide* by the landholder for raising a garden or tope or for forest under a contract for the temporary cultivation thereof with agricultural crops. The object of section 6 (2) appears to be to prevent the landholder assigning waste lands or lands reserved for a garden or forest. In *Subbaya* v. *Sree Raja Venkataramiah Apparao Bahadur*[2], it was held that to the case of waste lands in an estate which used to be

1. (1915) I.L.R. 38 Mad. 738: 25 M.L.J. 578.

2. (1924) 47 M.L.J. 469: 10 L. W. 626: A.I.R. 1924 Mad. 832.

usually submerged in water in rainy season and not under cultivation at all section 163 of the Madras Estates Land Act, does not apply and the civil Courts have jurisdiction to grant mesne profits, that the fact that such land can at times be cultivated with labour and expenditure of money does not make it ryoti land within the meaning of that Act, and that when definition of ryoti land speaks of cultivable land, it means land that is ordinarily and usually cultivated and does not refer to waste land though even waste land can at times be cultivated by expenditure of money. In *Naganna Naidu* v. *Pitchayya*[1], a question arose whether 297 acres included in a lease before the Act of 1908 were ryoti lands within section 3 (16) of that Act although it had never been cultivated. On behalf of the Zamindar, it was contended that the entire extent was given for pasturaging and not for cultivation, and therefore, remained excluded from the patta. The Privy Council held that though the lands were not cultivated, the same could be reclaimed and brought under cultivation and as such they will fall within the definition of ryoti land. In *Athmanathaswami Devastanam* v. *Gopalaswami*[2], the Supreme Court while considering the question as to whether the lands in the suit were cultivable lands, observed that from the mere fact that they had not been cultivated for a long time or that they were waste lands covered with shrubs, jungle and the like, it cannot be held that they were not cultivable lands, and that the lands which can be brought under cultivation are cultivable land unless some provision of law provides for holding it otherwise in certain circumstances. The case before the Supreme Court was in respect of lands which have been allowed to be cultivated under the Grow More Food campaign and therefore the lands were taken as capable of cultivation without undue expenditure of money and labour. The test laid down by the Supreme Court in that case is that the land should be such that it could be brought under cultivation without undue expenditure of money and labour. The lands dealt with by the Privy Council in *Naganna Naidu* v. *Pitchayya*[1], are waste lands that were given for pasturaging and having regard to the fact that the lands could be brought under cultivation without much expenditure, the Court took the view that it should be taken to be cultivable land.

1. (1929) I.L.R. 52 Mad. 797 (P.C.) L.R. 56 I.A. 346: 57 M.L.J. 654: 30 L.W. 435: A.I.R. 1929 P.C. 249.
2. (1964) 1 M.L.J. (S.C.) 42: (1964) 1 S.C.J. 105: (1964) 1 An.W.R. (S.C.) 42: (1964) 3 S.C.R. 763: A.I.R. 1965 S.C. 338.

17. The suit lands, however, are hilly tracts full of trees, shrubs, mounds, thorns, etc. The situation of the lands is high up on the hill 7 miles from the foot of the hill and it is admittedly inaccessible even to pedestrians. Such hill tracts could not be brought under cultivation without undue expenditure of money and labour. Admittedly on the date of the assignment and when the landholder inducted the first plaintiff into possession of the lands, the lands were not cultivable lands, nor could they be made cultivable, unless a huge expenditure of money is incurred. Having regard to the preamble to Tamil Nadu Act XIV of 1947, the purpose of the Act is to prevent the indiscriminate alienation of communal, forest and private lands in estates pending the enactment of legislation for acquiring the interest of the landholders in such estates and introducing ryotwari settlement therein. The definition of forest land occurring in that Act definitely covers the land which is the subject-matter of assignment under Exhibit B-1. Sections 4 and 6 of that Act prohibit the landholder from selling, mortgaging, converting into ryati land, leasing or otherwise assigning or altering any communal or forest land in his estate without the previous sanction of the District Collector on or after 27th June, 1947, the date on which that Act came into force. Though the order of assignment in favour of the first plaintiff is in the year 1945, for, the purpose of determination of the character of the land, the definition of "forest land" occurring in that Act is material. Though Act XIV of 1947 came into force on 27th June, 1947, section 4 (1) (3) of that Act invalidates any transaction in relation to forest land exceeding 20 acres entered into before 27th June, 1947.

18. "Forest" has also been defined in section 2 (*a*) of the Madras Preservation of Private

1. (1929) I.L.R. 52 Mad. 797: 57 M.L.J. 654: L.R. 56 I.A. 346: 30 L.W. 435: A.I.R. 1929 P.C. 349.

Forests Act (XXVII of 1949) as waste or communal land containing trees and shrubs, pasture land and any other class of land declared by the Provincial Government to be a forest by notification. "Forest" has been defined in the Concise Oxford Dictionary as "Large tract covered with trees and undergrowth sometimes mixed with pasture, trees growing on it"... Thus, the lands covered by the assignment Exhibit B-1 clearly fall under the definition of "forest" under the provisions of Act XIV of 1947 or under the provisions of Act XXVII of 1949 or under the common and general notion of forests. In this case, the suit lands are not situated in the plains in which case it can be said that even though the lands have been left as waste, they could be made cultivable easily without spending much expenditure. But in this case the suit lands are entirely hilly tracts situated on the hill 7 miles from the foot of the hill which is not accessible even by pedestrians and which is full of trees, shrubs, thorns, stones and mounds. It is not thus possible to hold that they are cultivable lands attracting the definition of ryoti land. If the contention of the learned counsel for the respondents that even hilly tracts could be brought under cultivation after felling down the trees, shrubs, etc., and after reclamation, and therefore, the lands have to be taken as cultivable lands, were to be accepted, it will mean that any space on earth could be made cultivable, whether it is land, hill or sea. Even sea could be filled up and reclaimed and made cultivable after spending a huge expenditure of money and labour. For that reason it cannot be said that sea is a cultivable land. We have to therefore hold that at the time of the assignment, the lands were not ryoti lands but were forest lands, and therefore, the landholder had no right to assign the lands. In view of the finding that the suit lands are not ryoti lands, the first plaintiff will not be entitled to get patta for the same. In this view of the matter, it is unnecessary to go into the question as to whether the suit is barred under the provisions of Madras Act XXVI of 1948 as on the finding rendered on the question of the character of the land, the suit has to necessarily fail. The second appeal is therefore allowed, and the decree and judgment of both the Courts below are set aside, and the suit shall stand dismissed with costs, throughout.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

P. Kandaswamy .. *Petitioner**

v.

Hajee K. S. Mohamed Mohideen Rowther .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 10 (2) (ii) (b), 10 (2) (iii)—Petition for eviction—Premises consisting of two portions — Single tenancy agreement — One rent control application in respect of both the portions maintainable.

The concerned premises were two separate portions of a building with another portion in between. A consolidated rent for both the premises was fixed and there was no separate tenancy agreement in respect of each of the premises. Both the landlord and the tenant had proceeded all along on the basis of a single tenancy. The landlord filed one petition for eviction of the tenant from both the premises.

Held: When there is a single tenancy agreement even if the premises consists of more than one portion a rent control application in respect of the entire premises can be maintained. [*Para.* 4.]

Cases referred to:—

T. N. Unnamalai Achi v. *Saminatha Pathar,* (1980) 93 L.W. 404; *Langford Property Company* v. *Goldrich,* (1949) 1 All E.R. 403; *Umsalma Bibi* v. *R. Lakkia Gowder,* (1967) 1 M.L.J. 277; *S. M. Gopalakrishnan Chetty* v. *Ganeshan,* (1976) 1 M.L.J. 27; *G. Natarajan* v. *P. Thandavarayan,* (1969) 2 M.L.J. 19; *V. Balakrishna Menon* v. *M. A. K. Govindan,* (1978) T.L.N.J. 364; *Busching Schmitz (P.) Ltd.* v. *P. T. Menghani,* (1977) 3 S.C.R. 312: (1977) 2 S.C.C. 835: A.I.R. 1977 S.C. 1569.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the decree of the Court of the Subordinate Judge (Appellate Autho-

*C.R.P. No. 2359 of 1979. *8th September,* 1981.

rity) Pudukottai, dated 13th September, 1979 and passed in C.M.A. No. 2 of 1979 (R. C.O.P. No. 5 of 1978, dated 20th January, 1979 on the file of the Court of the District Munsif (Rent Controller) Pudukkottai).

N. R. Chandran and *P. O. Dinakaran,* for Petitioner.

Hajee P. K. Jamal Mohamed, for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is filed by the tenant in respect of the premises situate in T.S. No. 3969|5, T.S. No. 3969|3 in Pudukkottai Town against the orders of the appellate authority and the Subordinate Judge, Pudukkottai in C.M.A. No. 2 of 1979. The landlord originally filed an application in R. C.O.P. No. 5 of 1978 on the file of the Court of the Rent Controller and the District Munsif, Pudukkottai for eviction of the tenant from the above mentioned premises on the ground that the tenant had caused damages to the above mentioned premises and also used the premises for a purpose other than that for which it was leased out. The premises in T.S. No. 3969|5 is described in A schedule in R.C.O.P. No. 5 of 1978 and the same was let out for non-residential purpose according to the landlord. The premises comprised in T.S. No. 3969|3 is described in B schedule to the above said R.C.O.P. and the same is leased out for residential purpose according to the landlord. The consolidated rent for both the premises is Rs. 160 per month. The tenancy in respect of B schedule premises started in 1943 as per Exhibit A-11. There is no evidence as to the commencement of the tenancy in respect of A schedule premises and also there is no evidence as to when the consolidated tenancy came into being on a monthly rent of Rs. 160. The case of the landlord before the Rent Controller is that during the Pongal holidays in the year 1978 when the Court was closed the tenant without getting the consent of the landlord and even without informing the landlord had made alterations in the A schedule premises and thereby caused acts of waste and damage to the building which are likely to impair materially the value and utility of the building. The tenant had removed the tiles and raised brick walls with a view to put up asbestos or some other roofing. Raising walls and putting some other roofing in the place of existing tiled roofing is an additional weight to the old building which is more than 60 years old and would certainly constitute an act of waste which is likely to impair materially the value of the building. It is also the case of the landlord that the tenant had done these alterations in the midnights which shows his *mala fide* intention. The alteration is also done without the permission of the Municipality and thereby committed disobedience of the Town Planning Rules for which the landlord may be held liable. Immediately on knowing the unlawful act of the tenant the landlord complained to the police and the police came to the spot and prevented further construction. The case of the landlord with reference to the B schedule premises is that the same is let out for residential purpose and without the written consent of the landlord the tenant had converted the same for non-residential purpose and the tenant is not residing in the B schedule premises. The tenant is residing in the newly constructed house situate at Alangudi Road in Pudukkottai and using the B schedule premises for storing his saleable materials and thereby caused damages to the floor and the walls of the building. Hence the landlord is entitled to evict the tenant in respect of A and B schedules premises. The case of the tenant before the Rent Controller is that the allegation of the landlord that the premises in T.S. No. 3969|5 was let out for business purposes and the premises in T.S. No. 3969|3 was let out for residential purpose is not correct. The tenant's father was in occupation of T. S. No. 3969|5, T.S. No. 3969|3, T.S. No. 3969|4 and T.S. No. 3969|2, which originally belonged to another landlord from the year 1937. The landlord's father purchased T.S. No. 3969|5 from Ponnammal and others on 5th May, 1944 and T.S. No. 3969|3 from Thambuswamy Pillai and others on 12th January, 1943. Even after the purchase by the landlord's father the tenant's father continued as tenant. It is false to say that the premises in T.S. No. 3969|3 was used only for residential purposes. Except for the kitchen in T.S. No. 3969|3, the building had always been used only for purposes of storing the goods. In fact there was a fire accident in 1959, where the goods were stored in T.S. No. 3969|3. The admission on the part of the landlord that

the monthly rental is Rs. 160 clearly shows that the premises were not let out separately but there was only one composite lease. The family of the tenant was using the portions of T.S. No. 3969|4 belonging to another landlord where lavatory, well, bathroom and bed room are situate. It is also the case of the tenant that he had not committed any act of waste or damage which is likely to impair materially the value or utility of the premises. The roofing in the front portion of T.S. No. 3969|5 was damaged by the cyclone and continuous rain in November, 1977 and the walls got soaked with rain water and the electric installation was affected and the electric current was leaking in the wall. The tenant took the permission of the landlord to effect the necessary repairs and since the tenant did not want his business to be suspended during day time he carried out minor repairs to the affected roofing during night. The landlord had made a false complaint and the tenant appeared before the police and gave the true version. The tenant did not do anything which will affect the value of the building. The rent for the premises from 1943 to 1950 was Rs. 27.50 and from 1950 to 1957 it was raised to Rs. 40 and from 1957 to 1962 it was again raised to Rs. 50. From 1962 to 1968 the rent was paid at Rs. 60 and from 1969 to August, 1976 the rent was Rs. 100 and from August, 1976 the rent was fixed at Rs. 160 per month. The landlord has come forward with this application just for higher rent. No damage has been caused to the floor or wall as alleged. By no stretch of imagination it can be said that the tenant had lost his statutory right to remain in the premises.

2. On these pleadings and after a full-fledged trial the learned Rent Controller came to the conclusion that the landlord is entitled to an order of eviction on both the above said grounds and allowed the application for eviction. As against the orders of the Rent Controller the tenant filed an appeal in C.M.A. No. 2 of 1979 on the file of the Court of the appellate authority and the Subordinate Judge, Pudukkottai and the appellate authority agreed with the findings of the Rent Controller on both the above said grounds and dismissed the appeal. It is as against the orders of the appellate authority this civil revision petition has been filed by the tenant.

3. The first contention urged on behalf of the civil revision petitioner is that the rent control application itself is not maintainable since the reliefs in respect of the two buildings mentioned in A and B schedules to the petition have been clubbed together and hence the Rent Control Petition itself ought to have been dismissed on the ground of misjoinder of causes of action. In considering this plea it has to be noted that in the counter statement to the R.C.O.P. the tenant had not taken this plea. The tenant had also not taken this plea before the appellate Court. It is urged on behalf of the landlord that the provisions of the Code of Civil Procedure are not made applicable to the proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act. Hence the provisions of the Code of Civil Procedure with reference to the misjoinder of causes of action cannot be applied to the above said proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act. The facts of this case reveal that the premises mentioned in Schedules A and B are separate portions of the building with another portion in between. We have to consider whether the filing of a single application in respect of both the premises is possible under the provisions of the Act.

4. In considering whether an application in respect of both the portion can be filed by a single application the nature of tenancy will have to be borne in mind. It is in evidence before the Rent Controller that the consolidated rent for both the premises is fixed at Rs. 160 per month and there is no separate tenancy agreement in respect of each of the premises. According to the evidence in this case though the tenancy in respect of B schedule property started in 1943 as per Exhibit 11, there is no evidence as to when in respect of A schedule property the tenancy had started. But subsequently the tenancy in respect of both the portions were consolidated and a consolidated rent of Rs. 160 per month has been fixed. Both the landlord and the tenant seems to have proceeded all along on the basis of a single tenancy. At no time the landlord and the tenant construed the tenancy as two separate tenancies. When there is a single tenancy agreement even if the premises consists of more than one portion a Rent Control application in respect of the entire premises can be maintained.

5. On behalf of the tenant reliance is placed upon the case reported in *T. N. Unnamalai Achi* v. *Saminatha Pathar*[1], where Nainar Sundaram, J., expressed the view that clubbing together in an eviction petition of residential and non-residential premises under section 10 (3) (*a*) (i) of the Act will cause prejudice to the tenant. In that case there were three different premises of which two served residential purposes and the third building served non-residential purpose. The provision under which the landlord claiming eviction is under section 10 (3) (*a*) (*i*) *viz.*, the requirement of the residential building by the landlord for his own use for residential purposes. The application was not one under section 10 (3) (*a*) (*iii*) which provides for a claim by the landlord for his own occupation in respect of non-residential premises. Since the standards to be observed in respect of a claim for eviction by the landlord under section 10 (3) (*a*) (*i*) for residential purpose and under section 10 (3) (*iii*) for non-residential purpose are different the learned Judge came to the conclusion that a single application is not maintainable. But in this case the landlord seeks eviction under section 10 (2) (*ii*) (*b*) *viz.*, that the tenant used the premises for the purpose other than that for which it was leased and under section 10 (2) (*iii*) *viz.*, that the tenant has committed acts of waste as are likely to impair materially the value or utility of the building. Different standards are not laid down in respect of those two provisions in an application with reference to a residential or non-residential building. Hence the above said decision of Nainar Sundaram, J., which was rendered in a different context cannot be said to be applicable to the facts of this case.

6. In the case reported in *Langford Property Company Limited* v. *Goldrich*[2], two flats on the same floor but separated by other flats were let out to one tenant on a quarterly tenancy. The rateable value of one flat was £ 98 and of the other £ 92. At no time these two flats were assessed together as one dwelling-house. The Court came to the conclusion that in view of the rent agreement the flats together constituted a dwelling house within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. On behalf of the landlord reliance is also placed upon the case reported in *Umsalma Bibi* v. *R. Lakkia Gowder*[1], wherein Ananthanarayanan, C.J., expressed the view that where a landlord seeks to apply for eviction of tenants from a building, which, though structurally one, has separate door numbers and consists of distinct tenements, for demolition and reconstruction under section 14 (1) (*b*) of the Act he must file separate applications for each building or tenement as defined in the Act. After making this observation the learned Chief Justice did not interfere with the orders of the lower Courts since he felt that no prejudice was caused to the tenant by such combination of reliefs in respect of different portions. The criterion seems to be whether by clubbing the reliefs in respect of more than one premises prejudice is caused to the tenant. In this case it is not made out that any prejudice is caused to the tenant by filing a single application in respect of the premises comprised in Schedules A and B of the Rent Control Application. In the case reported in *S. M. Gopalakrishnan Chetty* v. *Ganeshan and others*[2], the Supreme Court observed in categorical terms, that a single petition with regard to two different tenancies in the same premises *viz.*, one for residential purpose and the other for non-residential purpose, is maintainable when the tenancy is one. Inasmuch as the tenancy in this case is a single tenancy, applying the above principle laid down by the Supreme Court there is no difficulty in coming to the conclusion that merely because the reliefs with reference to both the premises are asked for in a single application it cannot be said that the application is not maintainable. Hence the first contention of the civil revision petitioner with reference to the maintainability of the Rent Control proceedings will have to be negatived.

7. The second contention urged on behalf of the civil revision petitioner is that there are no acts of waste with reference to the pre-

1. (1980) 93 L.W. 404.
2. (1949) 1 All E.R. 402.

1. (1967) 1 M.L.J. 277.
2. (1976) 1 M.L.J. 27.

mises in T.S. 3969|5 and that the tiled roofing of the premises was blown away during the cyclone and that the tenant only repaired the premises to make it habitable. It is also the case of the tenant that the repairs carried out by him will not in any away hamper the value of the building. In this connection the learned Advocate for the civil revision petitioner relied upon the case reported in *G. Natarajan* v. *P. Thandavarayan*[1], where it has been observed that while considering the content of section 10 (2) (*iii*) of Act XVIII of 1960, it is necessary that certain objective standards have to be set up, before a tribunal or Court engaged, in the adjudication of rights of parties decisively concluded that the act complained of is or has to be characterised as one impairing materially the value or utility of the building. Mere rendering of subjective opinion may not be of any avail unless such opinion is backed by expert evidence. In that case the Court considered whether the drilling of a hole in the roofing to instal a smoke pipe from the kitchen and cutting the parapet wall to the height of two feet in the terrace would amount to acts of waste. Considering the fact that this act will not in any way affect the material value or the utility of the premises this Court negatived the case of the landlord that the tenant is guilty of acts of waste. But in this case the documentary and the oral evidence let in before the Rent Controller clearly show that what the tenant did was not the mere replacement of the original roofing. A look into the photographs filed before the Rent Controller and a reading of the Commissioner's report will clearly show that the tenant had made additional constructions so as to increase the height of the wall and attempted to put up a new roofing *viz.*, an asbestos roofing in the place of tiled one. Both the Courts below have come to the conclusion that increasing the height of wall will result in additional load on the existing walls which may crumble under the weight and the same will amount to an act of waste which will impair the value of the building. Further the construction is without obtaining a building licence from the municipality which is an offence under the Town Planning Rules and for which the landlord may be held liable. It is also in evidence that the constructions were done during night time clandestinely and the landlord had resorted to police complaint to stop such construction. Considering all the aspects of the case the concurrent finding of both the Courts below that the additional constructions amount to an act of waste which will impair the value of the building is correct and no interference is called on this aspect.

1. (1969) 2 M.L.J. 19.

8. The third point urged by the civil revision petitioner is that the finding that the premises in T.S. No. 3969|3 was put to different use other than the one for which it was leased out is not correct. The case of the tenant is that from the inception he had been using the kitchen in the premises comprised in Schedule B and the rest of the portion for storing his business articles and as such there is no conversion by the tenant. From the evidence before the Rent Controller that the premises is a residential house with a kitchen and that the tenant had been residing in that house both the Courts below came to the conclusion that the purpose for which the premises was let out was a residential one. The case of the civil revision petitioner before the Rent Controller is that the premises had always been used for non-residential purposes. The civil revision petitioner relies upon the case reported in *V. Balakrishna Menon* v. *M. A. K. Govindan*[1], where it has been laid down that in case of a building let out for residential and non-residential purposes, the dominant purpose for which the building was let out will be the criterion in granting reliefs contemplated under the Act. In the case reported in *Busching Schmitz Private Limited* v. *P. T. Menghani and another*[2], a case arising under Delhi Rent Control Ordinance XXIV of 1975, the Supreme Court observed that in construing the nature of the building the suitability of two premises for a particular purpose also will have to be taken into consideration. Relying on these cases it is contended on behalf of the landlord that the building was originally used for residential purpose and it was let out for residential purpose and in fact the tenant was actually residing in the premises and hence the present use of the premises by the tenant for non-residential purpose clearly amounts to an act

1. (1978) T.L.N.J. 364.
2. (1977) 3 S.C.R. 312: (1977) 2 S.C.C. 835: A.I.R. 1977 S.C. 1569.

of conversion of the user of the building from residential into non-residential purpose.

9. The evidence before the Rent Controller clearly shows that the building is a residential one and the same had been let out for residential purpose and there is also proof that the premises is now being used by the tenant for non-residential purpose. Considering the entire evidence it cannot be said that finding of both the Courts below that the tenant had put the building to a different use other than for which it was let out cannot be said to be incorrect.

10. In any event the concurrent finding on facts with reference to the question of act of waste and putting the premises to a different use other than for which it was let out, rendered by both the Courts below on evidence cannot be interfered with in revision. The civil revision petitioner has not succeeded in showing that the findings of both the Courts below on the above three points are in any way incorrect or perverse. Hence all the three contentions of the civil revision petitioner are negatived and consequently the civil revision petition is dismissed. There will be no order as to costs. The tenant is given six months time to vacate.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Lakshmiammal .. *Petitioner**

v.

Boobalan and others .. *Respondents.*

Indian Succession Act (XXXIX of 1925), sections 373, 387—Court's power to issue succession certificate — 'B' having deposit with a private limited Company — B's wife filing after his death a petition for issue of a succession certificate — Order passed enabling her to obtain money from the Company — After eleven years application by third parties for re-deposit of amount, alleging that the succession certificate was obtained by abusing the process of Court—Application ordered—Jurisdiction of the Court to pass such order on application by third parties negatived.

The Indian Succession Act, 1925, makes a comprehensive provision for the issue of succession certificates under part X of that Act. It provides for an elaborate procedure for the application and for the hearing and the making of an order for the issue of a succession certificate—*Vide* sections 382, 373 and 374 of the Act. Section 383 provides for revocation of the succession certificate by the Court which grants it under certain circumstances. This shows that in a proper sense it cannot be held that on the issue of a succession certificate the Court concerned become *functus officio*. So long as the succession certificate remained intact and had not been revoked or otherwise set aside, the succession certificate or anything done pursuant thereto could not be unsettled. [*Paras.* 4 *and* 5.]

Part X of the Succession Act itself clearly recognises that when once a succession certificate has been granted, such a certificate would be conclusive as against the persons owing such debts. So far as those persons are concerned, all payments made by them in respect of such debts to the person to whom, the certificate is granted would be fully indemnified as against the subsequent claimants. This shows that as respects one of the parties to a succes-

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*C.R.P. No. 2372 of 1978.
21*st September,* 1981.

sion certificate, namely, the deceased's debtors, strangers to the proceedings can have no remedy whatsoever as respects the grant of the succession certificate or as respects anything done pursuant to such succession certificate. [*Para.* 6.]

The jurisdiction of the Court issuing the succession certificate is, in some respects, a peculiar jurisdiction. In one sense, it is like any other jurisdiction exercisable by a civil Court trying adversary proceedings. In another sense, it does not possess the same degree of finality as the decision of a civil Court in a civil suit or other contentious proceedings Section 373 shows that within the narrow limitations of a summary procedure, the Court has yet the fullest power to grant a succession certificate and when once a certificate is granted on a *prima* facie satisfaction of the judge, even where there is scope for a fuller inquiry such a certificate has precisely the same status as a certificate which is issued after a full and final inquiry and to the complete satisfaction of the Court. The only way to remove the certificate out of the way is either by way of an appeal or by way of a revocation. [*Para.* 6.]

Express provision is made by section 387 of the Act, saving the remedy by way of a suit to question the right or title of any party under a succession certificate. This provision is to the effect that no decision under Part X of the Indian Succession Act on any question of right between any parties shall be held to bar the trial of a similar issue in any suit or any other proceedings between the same parties. The same section further provides that nothing in Part X shall be construed to affect the liability of any person to account for any money or any debt to any person who may be held lawfully entitled thereto. The latter part of section 387 apparently has reference to a party who is held by a competent Court to be lawfully entitled to any money or debt being the subject-matter of a succession certificate. Although this section is couched in a negative form, the fact that such a provision finds its place in Part X itself shows that, excepting by way of a regular suit, the validity of the grant cannot be questioned by any third party. This is a reference under section 387 not only to suits but also to other proceedings. Obviously, the reference is to suits and other proceedings between those who are already parties to the succession certificate proceedings. Section 387 has nothing to say as respects those who are perfect strangers to the proceedings for the issue of succession certificate. Their position is *a fortiori.* Even if in regard to the parties to a succession certificate proceeding, their right to challenge the title of the grantee of a succession certificate is reserved to a separate suit or other legal proceedings, then the position must be *a fortiori* in regard to third parties or strangers to those proceedings. They cannot invoke the jurisdiction of the Court issuing the succession certificate as persons entitled to pursue such a remedy. In this sense, therefore, the application filed by respondents 1 to 3 before the lower Court was incompetent and ought to have been thrown out as not maintainable. [*Para.* 7.]

The power to issue a succession certificate is no doubt conferred by the Succession Act on a judge who is already the presiding officer of a Court of original jurisdiction. But merely because he happens to be a Court and as a civil Court he may have inherent powers to exercise in civil suits and other allied proceedings, it cannot be said that they are also available for being invoked when the learned Judge is sitting and disposing of proceedings under Part X of the Succession Act. [*Para.* 9.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Additional District Munsif, Coimbatore, dated 7th June, 1978, and passed in I.A. No. 83 of 1977, in O.P. No. 27 of 1966.

Miss M. B. Dominique, for Petitioner.

The Court made the following

ORDER.—One Balasundaram Chettiar who is now no more, had a deposit with the A.B.T. (P.), Ltd., Pollachi. On the date of his death, there were amounts still in deposit with that concern. Subsequently, Lakshmiammal, the petitioner in this revision, filed a petition for the issue of a succession certificate in the District Munsif's Court, Coimbatore. An order was passed in that petition on 5th April, 1966, enabling her to obtain an aggregate sum of Rs. 16,461.45 from the A.B.T. (P.), Limit-

ed. It may be observed that in the said O. P., the petitioner was described as the wife of the late Balasundaram Chettiar. Subsequently, after nearly eleven years, on 26th May, 1977, respondents 1 to 3 filed an application before the learned District Munsif invoking the inherent powers of the Court and praying for an order directing the petitioner to deposit Rs. 4,184.98 out of the amount which had been received by her from A.B.T. (P.), Limited on the strength of the succession certificate issued in her favour by the Court. The respondents claimed in their application that the petitioner Lakshmiammal could claim no interest on the amounts lying in deposit to the credit of the deceased Balasundaram Chettiar and that she had obtained a succession certificate in respect thereof by abusing the process of Court. On notice of this application, the petitioner denied all the allegations levelled against her. She also submitted that the application for directing her to re-deposit the amount obtained by her from A.B.T. (P.), Limited did not lie.

2. The learned District Munsif overruled the contentions of the petitioner and directed her to deposit the amount of Rs. 4,184.98 into Court. The learned District Munsif, in the course of his order also upheld the maintainability of the application filed by the respondents.

3. The petitioner questions the jurisdiction of the learned District Munsif to call upon her to redeposit the amount which she had obtained from A.B.T. (P.), Limited on the strength of the succession certificate earlier issued to her. Learned counsel for the petitioner put her point on the basis that when once a succession certificate had been granted, the Court granting the said certificate becomes *functus officio*.

4. I do not think this way of describing the Court's want of jurisdiction is a correct one. The Indian Succession Act, 1925, makes a comprehensive provision for the issue of succession certificates under Part X of that Act. It provides for an elaborate procedure for the application, and for the hearing and the making of an order for the issue of a succession certificate—*Vide* sections 382, 373 and 374 of the Act. Section 383 provides for a revocation of the succession certificate by the Court which grants it under certain circumstances. This shows that in a proper sense it cannot be held that on the issue of a succession certificate the Court concerned becomes *functus officio*.

5. This is not, however, to say that the application which was filed by the respondents in this case before the Court below can be maintained. It may be observed that in that application the respondents were not minded to obtain a revocation of the succession certificate already granted; nor was any relief, as such, asked for in respect of anything touching the succession certificate. On the contrary, the relief claimed by the respondents was for a direction to the petitioner that she should deposit an amount of debt owing to the deceased which she was empowered to collect from, the deceased's debtors. In my view, so long as the succession certificate remained intact and not been revoked or otherwise set aside, the succession certificate or anything done pursuant thereto could not be un-settled. The respondents purported to file their application as a proceeding in continuation of the original petition filed by the petitioner for the issue of a succession certificate. But there is nothing in the Indian Succession Act, under which third parties and strangers to the proceedings could invoke the powers of the Court, not in respect of the certificate itself, but as respects the realizations of debts effected by the holder of the succession certificate subsequent to the issue of the certificate and on the strength of that certificate.

6. There is yet another consideration. Part X of the Succession Act, itself clearly recognises that when once a succession certificate has been granted, such a certificate would be conclusive as against the persons owing such debts. So far as those persons are concerned, all payments made by them in respect of such debts to the person to whom the certificate is granted would be fully indemnified as against the subsequent claimants. This shows that as respects one of the parties to a succession certificate, namely, the deceased's debtors, strangers to the proceedings can have no remedy whatsoever as respects the grant of the succession certificate or as respects anything done pursuant to such succession certificate. Nor is this all. The jurisdiction of the Court issuing the succession certificate is, in some respects, a peculiar jurisdiction. In one sense,

it is like any other jurisdiction exercisable by a civil Court trying adversary proceedings. In another sense, it does not possess the same degree of finality as the decision of a civil Court in a civil suit or other contentions proceedings. This latter aspect of the jurisdiction is illustrated by the provisions of section 373 of the Act. Under this provision, the Court has power to decide in a summary manner the entitlement of a party to the issue of a succession certificate. This decision, however, will have to be arrived at only where the judge decides that the right to collect the debt belongs to the applicant. Section 373, however, provides that if the judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceedings, the judge may nevertheless grant a certificate to the applicant if it appears to the Court that he is a person having *prima facie* the best title to that certificate. This provision shows that within the narrow limitations of a summary procedure, the Court has yet the fullest power to grant a succession certificate, and when once a certificate is granted on a *prima facie* satisfaction of the judge, even where there is scope for a fuller inquiry, such a certificate has precisely the same status as a certificate which is issued after a full and final inquiry and to the complete satisfaction of the Court. The only way to remove the certificate out of the way is either by way of an appeal or by way of a revocation.

7. Having regard to these peculiar characteristics of the grant, express provision is made by section 387 of the Act, saving the remedy by way of a suit to question the right or title of any party under a succession certificate. This provision is to the effect that no decision under Part X of the Indian Succession Act, on any question of right between any parties shall be held to bar the trial of a similar issue on any suit or any other proceedings between the same parties. The same section further provides that nothing in Part X shall be construed to affect the liability of any person to account for any money or any debt to any person who may be held lawfully entitled thereto. The latter part of section 387 apparently has reference to a party who is held by a competent Court to be lawfully entitled to any money or debt being the subject-matter of a succession certificate. Although this section is couched in a negative form, the fact that such a provision finds its place in Part X of the Succession Act, itself shows that, excepting by way of a regular suit, the validity of the grant cannot be questioned by any third party. There is a reference under section 387 not only to suits but also to other proceedings. Obviously, the reference is to suits and other proceedings between those who are already parties to the succession certificate proceedings. Section 387 has nothing to say as respects those who are perfect strangers to the proceedings for the issue of a succession certificate. In my judgment, their position is *a fortiori*. Even if in regard to the parties to a succession certificate proceedings, their right to challenge the title of the grantee of a succession certificate is reserved to a separate suit or other legal proceedings, then the position must be *a fortiori* in regard to third parties or strangers to those proceedings. These people cannot proceed to invoke the jurisdiction of the Court issuing the succession certificate as persons entitled to pursue such a remedy. In this sense, therefore, the application filed by respondents 1 to 3 before the learned District Munsif was incompetent and ought to have been thrown out by the learned District Munsif as not maintainable.

8. The learned District Munsif had overruled the submissions made by the petitioner on the question of maintainability in the view that the inherent powers of the Court were so vast as to include the ordering of a payment out application in the manner done in the present case. I have earlier summarised the scheme of Part X of the Succession Act with particular reference to the provisions defining the limits of the Court's jurisdiction. This part of the law relating to succession certificates, must, in my judgment, be regarded as a complete and self-contained code. Within the four corners of Part X of the Succession Act, it might well be open to read implied or ancillary powers as a necessary concomitant of powers which are expressly conferred on the Court. But apart from these express powers and ancillary and implied powers, there is no scope for introducing the doctrine of inherent powers of the Court for the purpose of attributing to the Court jurisdiction in regard to a matter not covered by Part X of the Act, either expressly by its provisions, or by necessary intendment.

9. The power to issue a succession certificate is no doubt conferred by the Succession Act to a Judge who is already the presiding officer of a Court of original jurisdiction. But merely because he happens to be a Court and as a civil Court he may have inherent powers to exercise in civil suits and other allied proceedings, it cannot be said that they are also available for being invoked when the learned Judge is sitting and disposing of proceedings under Part X of the Succession Act.

10. In any case, I am satisfied that the subject-matter of the application raises a contested issue about the title to the amount owed by A. B. T. (P.) Limited to the estate of the deceased Balasundaram Chettiar. This controversy or *lis* cannot be sought to be agitated by a mere interlocutory proceeding which, in its very nature, has to be inquired into and disposed of without the advantages of a full-blooded trial, which the parties can, as of right, have only in a regular suit.

11. For all the above reasons, the civil revision petition is allowed, the order of the learned District Munsif is set aside and the application filed before the learned District Munsif (I.A. No. 83 of 1979) is dismissed.

12. Respondents 1 to 3, although served with notice of this civil revision petition, have not appeared in Court either by person or by a counsel. However, Miss. Dominique, learned counsel for the petitioner carried me through the relevant provisions of the Succession Act in sufficient detail to enable me to dispose of the civil revision petition, fairly fully, I suppose.

13. The civil revision petition is disposed of accordingly.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—*K. Shanmukham, J.*

State Industries Promotion Corporation of Tamil Nadu Ltd., SIPCOT, represented by its Managing Director .. *Applicant**

v.

M|s. Arvind Distillery and Chemicals Ltd., 92, Pantheon Road, Madras-600008 and others .. *Respondents.*

Letters Patent (Madras), clause 12—Suit for recovery of amount due on mortgage—Property situate outside territorial jurisdiction of High Court — Suit whether one for land — Leave to sue whether can be granted.

The question which may often come up for consideration and which is involved in the instant application, is whether a suit for recovery of the amount due on a mortgage of property situated outside the territorial jurisdiction of the High Court is a suit for land.

Application was made by the plaintiff for leave to institute the suit on the allegation that as the title deeds were deposited at Madras, part of the cause of action arose within the local limits of the High Court's ordinary original jurisdiction and that notwithstanding the property being outside the local limits, the suit is not one for land.

In view of the decision of the Federal Court in *M|s. Moolji Jaitha and Company* v. *The Khandesh Spinning and Weaving Mills Company Limited,* 1950 S.C.J. 51: A.I.R. 1950 F.C. 83 and the principle stated by Chagla, CJ., in *Goverdhanlal Hamilal* v. *Hamrichpal Dalsukhrai,* A.I.R. 1952 Bom. 75, the decision reported in *Lakshmi Kantham* v. *Krishnaswamy Mudaliar,* (1904) I.L.R. 27 Mad. 157, is dissented from. In the result the application succeeds and leave is granted. [*Para.* 4.]

Cases referred to:—

Nalum Lakshmikantham v. *Krishnaswamy Mudaliar,* I.L.R. (1904) 27 Mad. 157; *The*

*Application No. 1974 of 1981.
14*th September,* 1981.

Official Assignee of Madras v. *T. C. Ramaswamy Iyengar,* (1912) 23 M. L. J. 726; *Sundara Bai Sahiba* v. *Tirumal Row Sahib,* (1909) I.L.R. 33 Mad. 131: 20 M.L.J. 103; *M|s. Moolji Jaitha and Co.* v. *The Khandesh Spinning and Weaving Mills Co., Ltd.,* 1950 S.C.J. 51: 1949 F.C.R. 849: A.I.R. 1950 F. C. 83; *Goverdhanlal Basilal* v. *Ramrichpal Dalsukhrai,* A.I.R. 1952 Bom. 75; *R. Rajagorhia* v. *Central Bank of India,* (1972) 76 Cal.W.N. 807; In the matter of the Petition of *S. J. Leslie,* (1872) Beng.L.R. 171; *Velliappa Chettiar* v. *Saha Govinda Doss,* (1929) 57 M.L.J. 190: I.L.R. 52 Mad. 809: 30 L.W. 169: A.I.R. 1929 Mad. 721.

This application prays that leave to sue against the defendants|respondents herein should be granted in this Hon'ble Court and with costs.

The Court made the following

ORDER.—The interesting question, which may often come up for consideration and which is involved in this application, is whether the suit for recovery of the amount due on a mortgage of property situate outside the territorial jurisdiction of this Court is a suit for land. Application No. 1974 of 1981 is by the plaintiff for leave to institute this suit on the allegation that as the title deeds were deposited at Madras, part of cause of action arose within the local limits of this Court's ordinary original jurisdiction and that notwithstanding the property being outside the local limits, the suit is not for land. The application is laid under clause 12 of the Letters Patent. The said provision reads as follows:—

> "12. *Original jurisdiction as to suits.*—And we do further ordain that the said High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Madras, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees".

2. There is, of course, a direct authority of this Court in *Nalum Lakshmikantham* v. *Krishnaswamy Mudaliar*[1]. On the following facts that plaintiffs in their plaint, prayed *inter alia,* that certain lands the title deeds relating to which had been deposited with them by the defendants might be sold, and the proceeds applied to the payment of the debt due to plaintiffs by defendants, and that all the lands were situated outside the original jurisdiction of the High Court. Moore, J. held, that the suit was one for land or other immovable property within the meaning of Article 12 of the Letters Patent, and the Court had no jurisdiction. This was simply followed by Bakewell, J., in *The Official Assignee of Madras* v. *T. C. Ramaswamy Iyengar and another*[2], for the learned Judge has observed at page 727 as follows:—

> "A suit to get rid of an incumbrance on land appears to me a suit for land equally with a suit to enforce or obtain a charge upon land see *Nelum Lakshmikantham* v. *Krishnasami Mudaliar*[1], *Sundara Bai Sahiba* v. *Tirumal Row Sahib*[3], since in each case the plaintiff claims an interest in the land and asks the Court to enforce his right; in the first case he asks for the entire interest in the land and in other cases for a partial interest only, and the former is therefore more clearly a suit for the land".

3. But I find there are substantial and sound grounds which restrain me from accepting the principle as laid down by the learned Judge. The foremost is in (*M|s. Moolji Jaitha and Co.* v. *The Khandesh Spinning and Weaving Mills Co., Ltd.*[4]), Kania, CJ. has ruled that on a proper construction of the plaint the claim in respect of the Jalgaon lands was a claim by a principal against his agent in respect of the property acquired by

1. (1904) I.L.R. 27 Mad. 157.
2. (1912) 23 M.L.J. 726.
3. (1909) I. L. R. 33 Mad. 131: 20 M.L.J. 103.
4. 1950 S.C.J. 51: 1949 F.C.R. 849: A.I.R. 1950 F.C. 83.

the agent by the use of the principal's funds. He found that clause 19 of the Letters Patent permits the Court to apply the equitable principles of English law on the Original Side of the High Court inspite of clause 12 of the Letters Patent. As under those principles, the Court can grant relief to a litigant in respect of lands situate outside the jurisdiction of the Court against a party standing in fiduciary relationship to him, the Court had jurisdiction to grant relief in respect of the "Jalgaon lands". It is relevant to notice that there was no difference of opinion among the learned Judges as to the principle so propounded by Kania, CJ., of the Federal Court. In this case the suit is not for recovery of possession, nor is the question of the title to the land involved even indirectly. Indeed, till execution is levied there is no need for the Court to deal with any question relating to the property; all that the Court has to decide is the amount due on the mortgage. Further even in execution, the Court is in no way concerned with the possession of the property or the title to the property. Thus applying the test formulated in the above decision of the Federal Court, I have to hold that this suit is not one for land. Secondly in *Goverdhanlal Bansilal* v. *Ramrichpal Dalsukhrai*[1], a Division Bench of the Bombay High Court has stated the principle thus:

"It has been held by this Court that in a suit to enforce a debt, although the property mortgaged is outside the jurisdiction, inasmuch as the deposit of title deeds was made in Bombay, this Court would have jurisdiction to entertain and try the suit. Therefore, the only question is whether although the High Court had jurisdiction to try the suit, there is anything in the provisions of the City Civil Court Act, which excludes the jurisdiction of the High Court".

Turning to section 12, it provides:

" Notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court".

Therefore, it is only with regard to these suits which have been made cognizable by the City Court by reason of this Act that the jurisdiction of the High Court has been taken away; but with regard to all those suits which were cognizable by the High Court and which have not been made cognizable by the City Court, the jurisdiction of the High Court continues, and therefore as this suit was cognizable by the High Court and is not cognizable by the City Court, the jurisdiction of the High Court has not been effected. Therefore, we must hold that this Court has jurisdiction to try the mortgage suit". This decision reiterates the ratio laid down by the Federal Court. Lastly I find *R. Rajgorhia* v. *Central Bank of India*[1], has followed the dictum of the Federal Court. It is true that *Rajgorhia's case*[1], makes no reference to (In the matter of the petition of *S. J. Leslie*[2], but the later view followed by the Calcutta High Court is not the one upheld in In the matter of the petition of *S. J. Leslie*[2]. It is relevant to notice that Moore, J., simply accepted the ratio in In the matter of the petition of *S. J. Leslie*[2], as correct. It is equally interesting to note that in a Full Bench decision of this Court reported in *Velliappa Chettiar* v. *Saha Govinda Doss*[3], though the Court did not decide the point, the following observation of Ramesam, J. "A suit for redemption may easily be considered as a suit for land. A suit for foreclosure, though the primary object is to recover money, may also be described as a suit for land as there is a prayer for recovery of land by reason of the foreclosure, but greater difficulty may arise if it is a suit for sale; though the Court may have a sell the land, what the plaintiff recovers is always money and it is difficult to describe the suit as one for land:........." favours the view that the suit like the present is not one for land.

4. In view of the decision of the Federal Court and in view of the principle stated by Chagla, CJ., I am persuaded to dissent from *Nalum's case*[4].

5. In the result the application succeeds and leave is granted.

R.S. —— *Application allowed.*

1. A.I.R. 1952 Bom. 75.

1. (1972) 76 Cal.W.N. 807.
2. (1872) 9 Beng.L.R. 171.
3. (1929) 57 M.L.J. 190: I.L.R. 52 Mad. 809: 30 L. W. 169: A. I. R. 1929 Mad. 721.
4. (1904) I.L.R. 27 Mad. 157.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *S. Nainar Sundaram, J.*

M|s. P. S. Ramamurthy and Company a firm represented by its Sole Proprietor P. S. Ramamurthy Sastry .. *Petitioner**

v.

M|s. Salvar Paints and Varnish Works (P.) Ltd. .. *Respondent.*

Tamil Nadu Debt Relief Act (XL of 1979), section 18—Decree obtained in the Bombay City Civil Court—Decree transferred to Subordinate Court, Chingleput for execution — Petition for stay of execution of decree under the provisions of the Tamil Nadu Debt Relief Act—Petition whether maintainable — "The Court which passed the decree"—Meaning.

If the Court which passed the decree is in the State of Tamil Nadu, there will be no difficulty in involving the provisions of section 16 of the Tamil Nadu Debt Relief Act, for the purpose of amendment as set out thereunder. But in the instant case the Court which passed the decree was the Bombay City Civil Court which is beyond the State of Tamil Nadu. The provisions of the Act are analogous and *in pari materia* with the provisions of the Tamil Nadu Agriculturists Relief Act of 1938. These pieces of legislation are expropriatory in character and if there is any doubt as to the meaning of the terms and the scope of the application of such statutes the doubt should be resolved in favour of the person ex-propriated and not of the person who claims the right to expropriate. The provisions of such statutes should be strictly construed and their scope ought not be extended beyond what is clearly and expressly indicated by their terms. Sub-section (2) of section 1 of the Act clearly states that the Act extends to the whole of the State of Tamil Nadu. It leaves no room for ambiguity that the provisions should be invoked and worked out only within the State of Tamil Nadu and nowhere else. The machinery under section 18 of the Act can be set in motion only for a specific purpose and that is to enable the person entitled to the benefits of the Act to approach the Court which passed the decree to have it amended under section 16 of the Act. The Court which passed the decree in the instant case is the Bombay City Civil Court and as stated above it is beyond the State of Tamil Nadu. Hence it would be not in terms of section 16 of the Act to clothe that Court with jurisdiction to amend such decrees invoking the provisions of section 16 of the Act. [*Para.* 5.]

The statute being expropriatory in nature, it has got to be strictly construed and there is no warrant for extending its operation beyond what the express terms of the Act indicate. Section 16 of the Act as such could be invoked only by a Court which passed the decree, provided that Court is within the State of Tamil Nadu and not elsewhere. If there is no scope for amending the decree under section 16 of the Act, it will be futile to invoke the aid of section 18 of the Act. [*Para.* 6.]

Case referred to:—

V. Anantaramaiah v. *M. Venkata Subba Rao*; (1970) 1 An.W.R. 29.

Petition under section 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge (Principal) Chengalpattu, dated 14th February, 1980, and made in E.A. No. 727 of 1979 in E.P. No. 130 of 1979 in Bombay City Civil Court A.S. No. 89 of 1967.

M. S. Subramanian, for Petitioner.

P. Rathinadurai, for Respondent.

The Court made the following

ORDER.—The respondent herein obtained a decree against the petitioner herein in A.S. No. 89 of 1967 on the file of the Bombay City Civil Court. The decree got transferred to the file of the Subordinate Judge of Chengalpattu and execution by way of attachment and sale of the immovable properties of the petitioner is being prosecuted in E.P. No. 130 of 1979. The petitioner filed E.A. No. 727 of 1979 under section 18 of the Tamil Nadu Debt Relief Act (XL of 1979), hereinafter referred to as the Act, for stay of execution. That application has been dismissed by the Subordinate Judge of Chengalpattu on 14th February, 1980 and the present revision is directed against the said order.

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*C.R.P. No. 2843 of 1981.
29th September, 1981.

2. The reasoning of the Court below for dismissing the application under section 18 of the Act is that the Act as such could not apply to Bombay City Civil Court, which passed the decree and hence the petitioner cannot seek amendment of such a decree under section 16 of the Act and in the said circumstances the stay of the proceedings under section 18 of the Act is incompetent.

3. Mr. M. S. Subramanian, learned counsel for the petitioner submits that no such limitation as the Court below has spelt out is possible on a construction of the provisions of the Act and in particular sections 16 and 18, thereof. Sections 16 and 18 of the Act read as follows:—

"16. *Amendment of certain decrees.*—Where before the date of the publication of this Act in the Tamil Nadu Government Gazette, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is a debtor within the meaning of this Act, or in respect of a Hindu Joint Family debt on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder within six months from the date of such publication apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (Central Act V of 1908), amend the decree accordingly or enter satisfaction, as the case may be:

Provided that all payments made or amounts recovered, whether before or after the date of such publication in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor.

18. *Stay of execution proceeding.*—Every Court executing a decree passed against a person entitled to the benefits of this Act, shall, on application, stay the proceedings until the Court which passed the decree has passed orders on application made or to be made under section 16:

Provided that where within sixty days after the application for stay has been granted, the judgment-debtor does not apply to the Court which passed the decree for relief under section 16 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary.

Explanation.—The expression "the Court which passed the decrees shall have the same meaning as in the Code of Civil Procedure, 1908 (Central Act V of 1908)."

4. The expression "the Court which passed the decree" has been defined under section 37 of the Code of Civil Procedure as follows:

"37. *Definition of Court which passed a decree.*—The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,.. ....

(*a*) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(*b*) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

5. If the Court which passed the decree is in the State of Tamil Nadu, there will be no difficulty in invoking the provisions of section 16 of the Act for the purpose of an amendment as set out thereunder. The difficulty arises because admittedly in the instant case the Court which passed the decree is the Bombay City Civil Court, which is beyond the State of Tamil Nadu. The provisions of the Act are analogous and *in pari materia* with the provisions of the Tamil Nadu Agriculturists Relief Act (IV of 1938). These pieces of legislation are ex-propriatory in character and if there is any doubt as to the meaning of the terms and the scope of the application of such statutes, the doubt should be resolved in favour of the person ex-propriated and not of the person who claims the right to ex-propriate. The provisions of such statutes should be strictly construed and their scope ought not to be extended beyond what is clearly and expressly indicated by their terms. Sub-section (2) of section 1 of the Act clearly states that

the Act extends to the whole of the State of Tamil Nadu. It leaves no room for ambiguity that the provisions should be invoked and worked out only within the State of Tamil Nadu and nowhere else. The machinery under section 18 of the Act can be set in motion only for a specific purpose and that is to enable the person entitled to the benefits of the Act to approach the Court which passed the decree to have it amended under section 16 of the Act. The Court which passed the decree in the instant case is the Bombay City Civil Court and as stated above it is beyond the State of Tamil Nadu. Hence it would be not in terms of section 16 of the Act to clothe that Court with jurisdiction to amend such decrees invoking the provisions of section 16 of the Act.

6. Mr. M. S. Subramanian, learned counsel for the petitioner, draws my attention to a judgment of Krishna Rao, J., in *V. Anantaramaiah* v. *M. Venkata Subba Rao*[1], for the proposition that the provisions of the Madras Agriculturists Relief Act (IV of 1938) have been held to be applicable for the purpose of scaling down a debt which was originally incurred in an area to which the said Act did apply but which debt subsequently got assigned in an area to which the said Act did not apply. The contention raised in that case was that the parties are governed by the law in force at the place where the debt was incurred and therefore the debtor was entitled to claim the benefits of the Madras Agriculturists Relief Act (IV of 1938). This has been accepted by the learned single Judge of the Andhra Pradesh High Court. We are not faced with a similar situation in the present case. The question that has come up for consideration in the instant case is as to whether the Bombay City Civil Court, which is beyond the State of Tamil Nadu, can amend the decree under section 16 of the Act. It is not known as to whether the debt was incurred in the State of Tamil Nadu. No material has been placed either in the Court below or before this Court to indicate that the debt was incurred within the State of Tamil Nadu. In this state of affairs, it is not even possible to consider the ratio of the learned single Judge of the Andhra Pradesh High Court as having any bearing on the facts of this case. In the said circumstances, I do not feel called upon to express any opinion one way or the other on the ratio of the learned single Judge of the Andhra Pradesh High Court. The statute being expropriatory in nature, it has got to be strictly construed and there is no warrant for extending its operation beyond what the express terms of the Act indicate. Section 16 of the Act as such could be invoked only by a Court which passed the decree, provided that Court is within the State of Tamil Nadu and not elsewhere. If there is no scope for amending the decree under section 16 of the Act, it will be futile to invoke the aid of section 18 of the Act. In this view, I am not able to spell out any infirmity in the order passed by the Court below and accordingly this revision fails and the same is dismissed. There will be no order as to costs.

S.J. —— *Petition dismissed.*

1. (1970) 1 An.W.R. 29.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O.CJ.*

Kandaswami Gounder .. *Petitioner**

v.

T. Subramania Gounder .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 13—*Suit decreed* ex parte—*Petition by defendant to set aside the* ex parte *decree—Allegation of petitioner being ill and unable to attend Court—Doctor's certificate produced—Doctor not examined — Non-examination of doctor, whether fatal to the case—Evidentiary value of the Doctor's certificate.*

Held, it cannot be said that the medical certificate of a doctor cannot itself be an evidence to substantiate the reasonableness of the absence of the defendant, in the instant case. The decision in *Sarada* v. *Devaki,* (1935) 42 L. W. 22: A. I. R. 1935 Mad. 659, has not said that the certificate of a doctor cannot be taken as it is. It only indicates a procedure that can be safely followed without

*C.R.P. No. 752 of 1981.
6th November, 1981.

rejecting the procedure of accepting the medical certificate as evidence in appropriate cases.

[*Para*. 3.]

Cases referred to:—

Sarada v. *Devaki*, (1935) 42 L. W. 22: A.I.R. 1935 Mad. 659; *Lakshman* v. *Ellamal*, (1978) 91 L.W. 486; *Arunachala Aiyar* v. *Subramiah*, (1922) 16 L.W. 583: I.L.R. 46 Mad. 60: 43 M.L.J. 632: A.I.R. 1923 Mad. 63.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Udumalpet, dated 6th October, 1980 and made in C.M.A. No. 4 of 1980 (I.A. No. 392 of 1979 in O.S. No. 147 of 1977, District Munsif Court, Udumalpet).

K. Sukumar, for Petitioner.

K. M. Santhanagopalan, for Respondent.

The Court made the following

ORDER.—The plaintiff in O.S. No. 147 of 1977 on the file of the Court of the District Munsif, Udumalpet, is the petitioner-herein. He filed the suit for permanent and mandatory injunction against the defendant. The defendant on 4th February, 1978, filed the written statement. On 14th March, 1979, the suit was posted in the list for final hearing. On that day, it was adjourned to 16th March, 1979. On 16th March, 1979, the counsel for the defendant was present, but the defendant was absent. Hence, the counsel for the defendant reported no instruction. On 17th March, 1979, the Court passed an *ex parte* decree, against the defendant in the suit. On 24th March, 1979, the respondent herein filed an application under Order 9, rule 13, Civil Procedure Code, to set aside the *ex parte* order passed against him. The trial Court dismissed that petition on the ground that the doctor who gave the certificate regarding the illness of the defendant, has not been examined. Against the said order of dismissal, he preferred an appeal C.M.A. No. 4 of 1980 to the Court of the Subordinate Judge, Udumalpet. The Subordinate Judge, after observing that simply because that the doctor who issued the certificate has not been examined, one cannot totally brush aside the certificate issued by the doctor, allowed the appeal. It is against this order, the plaintiff in the suit has filed this civil revision petition.

2. It is submitted by Mr. K. Sukumar, learned counsel appearing for the petitioner that the non-examination of the doctor who issued the certificate regarding the illness of the defendant is fatal to the case and as such the appeal C.M.A. No. 4 of 1980 ought to have been dismissed. He also brought to my notice the decision in *Sarada* v. *Devaki*[1], wherein a Bench of this Court observed as follows:—

> "Some Judges from their experience of the medical practitioners in the locality in which the Court is situate may feel inclined, having formed a satisfactory opinion about medical practitioners there, to accept their medical certificate. That is a matter entirely for them. Other Judges may proceed on more cautions and regular lines and reject altogether a medical certificate and insist either on an examination on oath of the doctor who has given the certificate or at least an affidavit by him. In may view this is the correct procedure".

Citing this decision, the counsel appearing for the petitioner submitted that the observation of Nainar Sundaram, J., to the effect that a certificate issued by a Registered Medical Practitioner can be accepted by the Court as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness (Vide—*Lakshman* v. *Ellammal*[2]) cannot be sustained.

3. Mr. Santhanagopalan, learned counsel for the defendant brought to my notice the decision in *Arunachala Aiyar* v. *Subramiah*[3], wherein a Bench of this Court has observed as follows:—

> "In all those cases, this universal panacea for healing all wounds, as it has been called in England will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard. The Courts are here so that people who have cases can have those cases heard and determined and it should

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1. (1935) 42 L.W. 22: A.I.R. 1935 Mad. 659.

2. (1978) 91 L.W. 486.

3. 43 M.L.J. 632: I. L. R. 46 Mad. 60: (1922) 16 L.W. 583: A.I.R. 1923 Mad. 63.

never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerted, by making the man to blame pay for it.

The proper order in this case should have been that the case should be restored to the list and the judgment set aside on payment of all costs thrown away by the defendant, and that is the order that I propose to make".

In my view, the observation of the Bench as early 1922 must hold good in the interests of justice. The decision in *Sarada* v. *Devaki*[1], has not said that a certificate of a doctor cannot be taken as it is. On the other hand the procedure that can be safely followed in such matters is stated by the Bench without in any way rejecting the procedure of accepting the medical certificate as evidence in appropriate cases. Hence, I do not think that the medical certificate of the doctor cannot itself be an evidence to substantiate the reasonableness of the absence of the defendant in this case. Mr. Santhanagopalan, learned counsel appearing for the defendant-respondent submits that the defendant has examined himself to substantiate his case to the effect that he was sick on that date and hence, he was unable to appear in person when the case was called on 16th March, 1979. No doubt the learned Subordinate Judge has not referred to these matters in his order. If he had referred to the oral evidence of the defendant and other relevant matters in his judgment, there could not have been this difficulty in dismissing the civil revision petition. Nevertheless there are enough materials on record to come to the conclusion that the respondent was prevented by sufficient cause to appear before the Court on 16th March, 1979. Considering all these aspects of the case, I do not find any merit in this civil revision petition and as such the same is dismissed, but there will be no order as to costs.

R.S. ——— *Petition dismissed.*

1. (1935) 42 L.W. 22: A.I.R. 1935 Mad. 659.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

N. E. Venkatarama Iyer .. *Petitioner**

v.

C. N. Krishnaswamy .. *Respondent.*

Tamil Nadu Debt Relief Act (XIII of 1980), section 4 (1) (c)—Person claiming benefit under the Act—Production of income certificate—Laconic order passed by the Court: "Income certificate produced, petition allowed" —Order set aside—Duty of Court indicated.

The provisions under sections 5 and 6 of the Tamil Nadu Debt Relief Act (XIII of 1980 as amended by Act XXXV of 1980, and Act X of 1980) have to be taken advantage of by the persons qualified to take advantage of the same by approaching the Executive Authority contemplated under the provisions of the Act, *viz.*, The Tahsildar. There is also an appeal available in the very same Act conferring on an aggrieved person, who had applied before the Executive Officer *viz.*, the Tahsildar the right to appeal to the Revenue Divisional Officer. It is only that forum which has get the power to confer remedy on the persons who are entitled to the benefits of the Act. Therefore, the lower Court ought to have considered the provisions of sections 4, 5 and 6 and especially in the instant case of section 6 that is appliable to the facts of the case. The lower Court ought to have applied its mind before passing the impugned order—"Income certificate produced. Petition allowed", which is not in consonance with the prayer actually submitted before it by way of application by the judgment-debtor, under section 4 (1) (*c*) of the Act. What the income certificate was, under what provision it was produced and why on the basis of the same the application had been allowed are not clear. [*Paras.* 2, 4.]

Case referred to:—

Perumal v. *Chinna Kuppanna Gounder*, C.R.P. No. 2629 of 1980, (Legal Surveyor Page 61).

*C.R.P. No. 3258 of 1980.
17th November, 1981.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the II Additional Subordinate Judge, Coimbatore, dated 30th August, 1980, and made in E.A. No. 2151 of 1980 in E.P. No. 111 of 1978 in O.S. No. 746 of 1972.

V. V. Lakshminarayanan, for Petitioner.

V. Natarajan and *N. Nicholas*, for Respondent.

The Court delivered the following

JUDGMENT.—The learned Second Additional Subordinate Judge of Coimbatore, has allowed the Application *viz.*, E.A. No. 2151 of 1980 in E.P. No. 111 of 1978 in O.S. No. 746 of 1978 filed under section 4 (1) (*c*) of the Tamil Nadu Debt Relief Act (XIII of 1980) and sections 47 and 151 of the Code of Civil Procedure, by the judgment-debtor. The two sentences order of the lower Court reads as follows:

"Income certificate produced.

Petition allowed."

2. Even at the outset it is to be observed that what that income certificate was and under what provision it was produced before the lower Court and why on the basis of the same the application had been allowed are all a mystery.

3. It is really strange that such two sentences order has been passed by the lower Court when an application has been filed under section 4 (1) (*c*) of the Tamil Nadu Debt Relief Act (XIII of 1980 as amended by Act XXXV of 1980 and Act X of 1980). Section 4 (1) (*c*) of the said enactment reads as follows:

> "all suits and other proceedings (including appeals, revisions, attachments or execution proceedings) pending at the commencement of this Act against any debtor for the recovery of any such debt (including interest, if any) shall abate".

It is also relevant in this connection to note that there are two kinds of debtors; one under the provisions of section 5 of the enactment and another under the provisions of section 6 of the enactment of 1980.

4. The provisions under sections 5 and 6 of the Tamil Nadu Debt Relief Act (XIII of 1980 as amended by Act XXXV of 1980 and Act X of 1980) have to be taken advantage of by the persons who are qualified to take advantage of the same by approaching the Executive Authority contemplated under the provisions of the Act, *viz.*, The Tahsildar. There is also appeal provision available in the very same enactment itself conferring on the aggrieved person, who had applied before the Executive Officer, *viz.*, the Tahsildar to prefer appeal to the Revenue Divisional Officer. It is only that forum which has got the power to confer remedy on the persons who are entitled to the benefits of the Act. Therefore, the lower Court ought to have taken into consideration the provisions of sections 4, 5 and 6, and especially in the instant case, it is the provision under section 6 that is applicable to the facts of the case and as such it is needless to say that the lower Court ought to have applied its mind before it passed the order, which is not in consonance with the prayer actually submitted before it by way of application by the judgment-debtor, nor when viewed, with the previous orders passed in the various execution proceedings that had been taken by the decree-holder in O.S. No. 746 of 1972. The learned counsel for the respondent herein also points out that the lower Court had not taken into consideration the order that had been pased by it in E.P. No. 111 of 1978 and it is not known as to whether any appeal has been preferred as against the said order in E.P. No. 111 of 1978 and the failure to do so will have any effect on the present petition under consideration and the order thereon is itself a point which has to be taken into consideration by the lower Court. Under the circumstances, when such points have been just exhibiting themselves in gigantic measure, it is rather strange as to how the lower Court has shut its eyes and completely lost sight of the various points of law that arise in the instant case. Therefore, instead of further saying anything about the failure on the part of the lower Court in exercising the jurisdiction vested with it, it is sufficient at this stage to observe that it is a fit and proper case for being remanded to the lower Court for fresh disposal in the light of the observations made above in setting aside the order under revision. The power vested with this Court under the provisions of section 115 of the Code of Civil Procedure, is necessarily to be exercised with

respect to the order under revision and it is hereby exercised. The revision petition is allowed and the order of the lower Court is set aside. The lower Court is to take back the matter on its file and dispose of it in accordance with law as early as possible, and also in the light of the observations made in this order. The lower Court must also enlighten itself with the judgment of this Court, which is the only judgment reported so far as the proivisions of this Act are concerned *viz., Perumal* v. *Chinna Kuppanna Gounder*[1]. The court-fee paid on the revision petitions will be refunded to the petitioner.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

M. R. S. Sankara Mudaliar and others .. *Petitioners**

v.

B. M. Haji Abubacker Maricar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 10 (2) (i), 10 (2) (ii) (a), 2 (8), 26—*Petition for eviction — Wilful default and sub-letting — Death of tenant pending petition—Legal representatives of deceased tenant not impleaded —Eviction order passed against sub-tenants—Appellate Authority upholding order of eviction—Revision by sub-tenants — Sub-tenants contending that no eviction can be ordered without impleading the legal representatives of the deceased tenant — Contention rejected—Interest of deceased tenant held to be represented by the sub-tenants.*

The landlord filed a petition for eviction on the grounds of wilful default in payment of rent and sub-letting. The tenant vacated the premises pending the petition and also died. The landlord continued the petition against the sub-tenants without impleading the legal representatives of the deceased tenant and obtained an order of eviction. The sub-tenants filed an appeal and the Appellate Authority upheld the order of eviction. The sub-tenants filed a revision in the High Court and contended that the proceedings for eviction, could not be continued against them in the absence of the legal representatives of the deceased tenant.

Held: The provisions of Act XVIII of 1960 do not contain any definition of the term "legal representative". A consideration of the component parts of section 2 (8) of the Act which defines a "tenant" indicates that apart from the surviving spouse, son or daughter of a deceased tenant, other categories of persons were also contemplated as legal representatives. So far as the provisions of the Act were concerned, it was not only heritable relationship that mattered, but even other considerations. [*Para.* 8.]

Even section 26 of the Act would support the construction that apart from "the tenant" as contemplated under sections 10 (2) (*i*) and 10 (2) (*ii*) (*a*) of the Act, other persons could also be evicted on the strength of an order of eviction against the tenant which however was declared to be binding on persons who were not tenants. [*Para.* 10.]

The cause of action, as it were for seeking an order for eviction, having arisen due to the undisputed wilful default and sub-letting of the premises by the tenant without obtaining the consent of the landlord in writing, could not be wiped out or erased on the death of the tenant. [*Para.* 10.]

The object of the legislation would only be furthered and fulfilled by enabling a landlord to recover possession of the premises even as against the sub-tenants after the death of the main tenant. [*Para.* 11.]

Cases referred to:—

Guruswami Nadar v. *Natesa Nadar*, (1969) 2 M.L.J. 488; *South Asia Industries* v. *Sarup Singh*, (1966) 1 S.C.J. 186: (1965) 3 S.C.R. 829: A.I.R. 1966 S.C. 346; *Subramania Pillai* v. *Masterly*, (1976) 1 M.L.J. 341: 89 L.W. 291: A.I.R. 1976 Mad. 303.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act

1. C.R.P. No. 2629 of 1980; Reported in Legal Surveyor page 61.

*C.R.P. No. 1203 of 1980. 16*th April*, 1981.

(XVIII of 1960) as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the II Judge, Court of Small Causes, Madras (Appellate Authority, dated 18th March, 1980 and made H.R.A. No. 312 of 1979 (H.R.C. No. 3036 of 1976, Rent Controller XII Judge, Court of Small Causes, Madras).

M. N. Padmanabhan, A. S. Chakravarthi and *K. Chandrasekaran,* for Petitioners.

V. Shanmugham, Riaz Ali Khan and *D. T. Sethumadhavan,* for Respondent.

The Court delivered the following

JUDGMENT.—The respondents 2 to 4 in H.R.C. No. 3036 of 1976 before the XII Judge, Court of Small Causes, Madras, are the petitioners in this Civil Revision Petition, which arises out of an application filed by the respondent herein for an order of eviction against the petitioners and another. According to the case of the respondent, he is the owner of premises bearing Door No. 133, Moore Street, Madras-1, and that one S. M. Hussain *alias* Hallaj (the first respondent in H.R.C. No. 3036 of 1976) occupied the entire first floor portion thereof excepting a room as a tenant on a monthly rental of Rs. 215, exclusive of electricity charges.. The further case of the respondent was that Hussain *alias* Hallaj retained only one room for his own use and occupation and sub-let the other portions to the petitioners and the fifth respondent in the application for eviction and that the sub-lessees are in occupation of the respective portions paying rent to Hussain *alias* Hallaj. It was also the case of the respondent that Hussain *alias* Hallaj failed and neglected to pay the monthly rent of Rs. 215 from 1st January, 1974 to 31st July, 1976 amounting to Rs. 6,691 and that a registered notice, dated 24th August, 1976 was issued to Hussain *alias* Hallaj and also the petitioners demanding the payment of arrears of rent and also vacant possession of the entire portion of the premises in their occupation. In response to this, according to the respondent, Hussain *alias* Hallaj sent a cheque for Rs. 500 only and promised to vacate the premises within three months thereafter, but did not do so. Thereupon, the respondent filed an application for eviction on the ground that Hussain *alias* Hallaj had wilfully committed default in the payment of rents even after the issue of notice, dated 24th August, 1976 and that the petitioners and the fifth respondent in the application for eviction are sub-tenants and they are also not entitled to remain in possession of the premises.

2. Hussain *alias* Hallaj, the first respondent before the Rent Controller contended that he was the chief tenant of the premises and that no wilful default in the payment of rents had been committed by him. It was also his further plea that the rents had been regularly paid, but not given credit to and that the landlord had also filed a suit in O.S. No. 9033 of 1976, City Civil Court, Madras, and obtained a decree on 30th March, 1977. The inability to pay the rents was attributed to the irregularity in the payment of rents to him by the petitioners and the fifth respondent in the application for eviction. Ultimately, Hussain *alias* Hallaj prayed for four months' time to vacate the premises. The petitioners herein who figured as respondents 2 to 4 before the Rent Controller claimed that they are the direct tenants of the respondent herein and not the sub-tenants under Hussain *alias* Hallaj and that they were paying the rents regularly to the respondent for which no receipts had been issued and, therefore, there was no question of any wilful default in the payment of rents.

3. During the pendency of the application for eviction, Hussain *alias* Hallaj vacated the premises in his occupation some time in September, 1977 and also later died on 20th July, 1978, leaving behind him his sons and daughters. The respondent nevertheless continued the proceedings as against the petitioners and the fifth respondent in the application for evictions.

4. Before the Rent Controller, the respondent examined P.W. 1 and marked Exhibits P-1 to P-20, while the petitioners relied upon Exhibits R-1 to R-14 and examined R.Ws. 1 and 2 in support of their case. Before the Rent Controller, an objection was also raised by the petitioners that the eviction proceedings cannot be continued as against them. On a consideration of the oral as well as the documentary evidence, the Rent Controller found that Hussain *alias* Hallaj had wilfully defaulted in the payment of rents and that the petitioners are only sub-tenaits of Hussain *alias* Hallaj and not the tenants directly under

the respondent herein and, therefore, the petitioners are also liable to be evicted. It was also further held that the petitioners represented the interest of Hussain *alias* Hallaj and, therefore, it was unnecessary to implead his legal representatives. On those conclusions, an order for eviction was passed against the petitioners. Aggrieved by this, the petitioners preferred an appeal in H.R.A. No. 312 of 1979 before the Appellate Authority (II Judge, Court of Small Causes), Madras. The Appellate Authority, on a re-consideration of the entire oral as well as the documentary evidence, concurred with the conclusion of the Rent Controller that Hussain *alias* Hallaj had committed wilful default in the payment of rents for the period 1st January, 1974 to 31st July, 1976 and that the petitioners are only sub-tenants and not the tenants under the respondent. In this view, the order for eviction was upheld and the appeal preferred by the petitioners was dismissed. It is the correctness of this order that is challenged in this civil revision petition.

5. The main contention urged by the learned counsel for the petitioners is that in the absence of the legal representatives of Hussain *alias* Hallaj as parties to the proceedings, the eviction application could not have been continued or proceeded against with the petitioners alone on record and, therefore, the eviction order passed by the authorities below is unsustainable. Reliance in this connection is also placed by the learned counsel for the petitioners on the decision in *Guruswami Nadar* v. *Natesa Nadar*[1], per contra, the learned counsel for the respondent submits that the case of the petitioners throughout was that they were not sub-tenants but direct tenants of the respondent and that case having been found against, the petitioners cannot have higher rights than as such sub-tenants and as persons in possession of portions of the premises, the petitioners represent the interest of Hussain *alias* Hallaj and, therefore, the continuation of the further proceedings against them before the authorities below is quite in order. In this connection, the learned counsel for the respondent relied upon the decision of the Supreme Court in *South Asia Industries* v. *Sarup Singh*[1], and the decision in *Subramania Pillai* v. *Masterly*[2].

1. (1969) 2 M.L.J. 488.

6. Before proceeding to consider these rival contentions, it is necessary to advert to certain facts. The petitioners had been impleaded as persons in possession of portions of the premises as sub-lessees from Hussain *alias* Hallaj. The petitioners attempted to establish that they were the tenants of the respondent. Exhibit P-1, clearly establishes that Hussain *alias* Hallaj was the tenant in respect of the premises and the petitioners are not the tenants. Exhibit P-2 notice, dated 24th August, 1976 issued by the respondent to Hussain *alias* Hallaj clearly sets out that the petitioners are the sub-lessees and a copy of this notice has also been sent to the petitioners and served on them under Exhibits P-4 to P-6. The petitioners have not in any manner demurred to the statement made in Exhibit P-2, that they are only sub-lessees of Hussain *alias* Hallaj. The petitioners, who were fully made aware of their status as sub-lessees have been contending that they are not sub-lessees inducted into possession by Hussain *alias* Hallaj, but tenants directly under the respondent. There is no proof of any payment of rent at any point of time by the petitioners to the respondent. The evidence discloses that the tenancy agreement had been entered into between the respondent and Hussain *alias* Hallaj only and no such relationship had been made out between the petitioners and the respondent. A consideration of the oral as well as the documentary evidence clearly indicates that the petitioners have not satisfactorily established that they are tenants of the respondent. The authorities below, after exhaustively considering the evidence have concurred in holding that there was wilful default in payment of rents and the petitioners are only sub-lessees and not tenants under the respondent in relation to the premises. Even before this Court, no attempt was made by the learned counsel for the petitioners to challenge this finding of the authorities below.

1. (1966) 1 S.C.J. 186: (1965) 3 S.C.R. 829: A.I.R. 1966 S.C. 346.
2. (1976) 1 M.L.J. 341: 89 L.W. 291: A.I.R. 1976 Mad. 303.

7. Though the respondent has referred to section 10 (2) (*i*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXXIII of 1973) (hereinafter referred to as the Act) in the application for eviction, a fair reading thereof, particularly paragraphs 4 and 7, discloses that the respondent has filed his application for eviction on two grounds, namely, wilful default in the payment of rents and also sub-letting of the premises without the consent in writing of the respondent. Section 10 (2) (*ii*) (*a*) of the Act has not been specifically referred to in the application for eviction, but the averments therein are such as to sustain an application for eviction even on the ground of sub-letting and the petitioners as well as the respondent have also proceeded to trial fully understanding the implications of the pleas raised by the respective parties and no prejudice has been caused to the petitioners in any manner because every opportunity has been given to the petitioners to establish that they are not sub-lessees as claimed by the respondent, but only tenants under the respondent as claimed by the petitioners themselves, in which attempt of course, the petitioners have failed. Under these circumstances, no serious prejudice will be caused to the petitioners if the application for eviction filed by the respondent herein is taken and treated to be one on the ground that Hussain *alias* Hallaj has sub-let the premises in the occupation of the petitioners without the consent in writing of the respondent. The very plea raised by the petitioners in the course of the proceedings before the authorities below would negative any consent in writing and in the absence of any direct evidence regarding the tenancy between the respondent and the petitioners, the finding of the authorities below that the petitioners are only sub-lessees from Hussain *alias* Hallaj in possession of the premises in question belonging to the respondent cannot be assailed and indeed, as stated earlier, was not challenged.

8. The question that now arises for consideration is, whether, the petitioners can be treated as the representative of deceased Hussain *alias* Hallaj for the purpose of the further prosecution of the proceedings for eviction at the instance of the respondent. It is not in dispute that the provisions of the Act do not contain any definition of the term "legal representative". A consideration of the component parts of section 2 (8) of the Act which defines a "tenant" indicates that apart from the surviving spouse, son or daughter of a deceased tenant, other categories of persons are also contemplated as legal representatives. The wide definition of the expression "tenant" as comprehending and including a legal representative of a deceased tenant not being the spouse, son or, daughter, is not without significance and so far as the provisions of the Act are concerned, it is not only heritable relationship that matters, but even other considerations. The definition of the expression "legal representative" under section 2 (11), Code of Civil Procedure, which includes a person who intermeddles with the estate of the deceased person would also point out to the wider amplitude of the expression "legal representative". As earlier, stated, the finding of the authorities below which is amply supported by the evidence on record is to the effect that the petitioners are only sub-lessees and not tenants and, therefore, it is unnecessary to go into the question whether the petitioners would be the legal representatives of the deceased tenants within the meaning of the Act. In addition, the definition also excludes from the scope of the expression "tenant" a person placed in occupation of a building by its tenant, and, therefore, in view of them challenging the finding of the authorities below, the petitioners cannot claim that they are tenants.

9. It is now necessary to notice sections 26 and 27 of the Act. Under section 26 of the Act, any order for eviction of a tenant passed under the provisions of the Act shall be binding on all sub-tenants, who were made parties in the application for eviction. Any person, who became a sub-tenant after the date of the application for eviction, shall be bound by the order of eviction and be evicted, as if he were a party to the proceedings provided that such order was not obtained by fraud or collusion. Even before an order for eviction could be passed against Hussain *alias* Hallaj, he had surrendered possession of that portion of the premises in his occupation in September, 1977, and also later died on 20th July, 1978. This is not in dispute and virtually Hussain *alias* Hallaj has submitted to an order for eviction. No case of collusion or fraud between the respondent and Hussain *alias* Hallaj has been pleaded or proved by the petitioners. Section 27 (1) of the Act provides that any appli-

cation made, appeal preferred, or proceeding taken, under the provisions of the Act by or against any person, may, in the event of his death, be continued by or against his legal representatives. This shows that notwithstanding the death of a party to the proceedings already commenced, under the aforesaid provision of the Act, it may be continued by or against the legal representatives of the party. Section 27 (2) of the Act, however provides that where any application, appeal or other proceeding could have been made, preferred or taken, under the provisions of the Act, by or against any person, such application, appeal or other proceeding may, in the event of his death, be made, preferred or taken by or against his legal representatives. Section 27 (2) of the Act does not apply to the present case, as the application had already been made by the respondent against Hussain *alias* Hallaj and four others and only during the pendency of that proceeding, Hussain *alias* Hallaj passed.

10. Under sections 10 (2) (*i*) and 10 (2) (*ii*) (*a*) of the Act, a tenant is liable to be evicted, if the tenant had committed wilful default or transferred his right under the lease or sub-let the entire building or any portion thereof without the written consent of the landlord after 23rd October, 1945. In the present case, as pointed out already, the finding of the authorities below is that wilful default had been committed and the petitioners are sub-tenants and no consent of the respondent in writing has been either pleaded or established. The question is, whether the proceedings can be continued against the petitioners who have been found to be sub-tenants and an order for eviction passed against them, in the absence of the representation of the interest of Hussain *alias* Hallaj by his legal representatives. Section 10 of the Act opens by imposing a bar on the eviction of a tenant and the subsequent provisions as well as sections 14 to 16 of the Act, are really in the nature of exceptions, in the circumstances mentioned therein. A literal reading of section 10 (2) (*i*) and (*ii*) of the Act may appear to indicate that the person against whom an order for eviction can be made in cases falling under sections 10 (2) (*i*) and 10 (2) (*ii*) (*a*) of the Act would be the tenant who has not paid the rents or who has assigned his tenancy and no such order can be made against a person in whose favour the tenancy has been assigned. In other words, it may appear as if no order for eviction could ever be passed against persons in the position of the petitioners (sub-lessees) and the fact that Hussain *alias* Hallaj, ceased to be a party to the proceedings could not have, therefore, made any difference whatever. Section 10 of the Act sets out the circumstances in which the operative part of the sub-sections can be set in motion to secure an order for eviction. The use of the expression "the tenant" in sections 10 (2) (*i*) and 10 (2) (*ii*) of the Act indicates that the tenant whose eviction is sought on the ground of wilful non-payment of rent or sub-letting is the tenant of the landlord, who seeks eviction. That would mean that a landlord can recover possession of the premises, if his tenant has not paid rents or had assigned or sub-let without his consent in writing after 23rd October, 1945. To such a proceeding, if the sub-tenants are made parties, then section 26 of the Act declares that the order passed therein would be binding upon the sub-tenants, who were so made parties. Even with reference to a sub-tenant who becomes so after the date of the application for eviction, he would be bound by the order of eviction and be evicted. as if he were a party to the proceedings, if the order of eviction was not obtained by fraud of collusion. Therefore, even section 26 of the Act would support the construction that apart from "the tenant" as contemplated under sections 10 (2) (*i*) and 10 (2) (*ii*) (*a*) of the Act, other persons could also be evicted on the strength of an order for eviction against the tenant which however is declared to be binding on persons, who are not tenants. On the finding of the authorities below that wilful default in payment of rents had been committed and the petitioners are also sub-lessees without the consent in writing of the landlord and the submission of Hussain *alias* Hallaj to the order of eviction by surrendering possession in September, 1977, the respondent became entitled to recover possession of the premises under sectionss 10 (2) (*i*) and 10 (2) (*ii*) (*a*) of the Act even against the petitioners and unless the language of the sections made it impossible for the landlord, effect must be given to the sections. From the language employed in sections 10 (2) (*i*) and 10 (*ii*) (*a*)

read with section 26 of the Act, it cannot be said that the only person against whom an order for recovery of possession can be passed is the tenant assigning or sub-letting without the consent of the landlord. Further, it is rather difficult to hold that a right which had accrued to the landlord to recover possession should be taken away merely because the tenant, who assigns, has become extinct without leaving a successor. The cause of action, as it were for seeking an order for eviction, having arisen due to the undisputed wilful default and sub-letting of the premises by Hussain *alias* Hallaj without obtaining the consent of the respondent in writing, cannot be wiped out or erased on the death of the tenant. In the instant case, the sub-letting has survived even the tenant in that the petitioners still continue to remain in possession of the premises, though not as tenants under the respondent. The situation that would inevitably result, if the contention of the learned counsel for the petitioners is accepted, may now be referred to. On the finding of the authorities below that the petitioners are not tenants under the respondent, resort cannot be had by the respondent to secure an order for eviction against the petitioners. Likewise, even pursuant to a submission to an order of eviction by the tenant Hussain *alias* Hallaj, the petitioners cannot be evicted as the legal representatives of the tenant have not been impleaded. The result would be that the unauthorised possession of the premises by the petitioners can be perpetuated and maintained without any payment of rent to the respondent and the respondent cannot initiate any proceeding for the eviction of the petitioners. Indeed, such a situation would be an anomalous one and would virtually make available to the petitioners a total immunity from eviction. This would be all the more so in a case like this when the petitioners have been opposing an order for eviction on the ground that they are direct tenants. Under these circumstances, it is difficult to accept that no order for eviction could be passed against the petitioners, who have been found to be sub-tenants, in the absence of the impleading of the legal representatives of the deceased tenant Hussain *alias* Hallaj.

11. In *South Asia Industries* v. *Sarup Singh*[1], Allen Berry and Company (Calcutta) Ltd., was the tenant in respect of certain premises and the lease was transferred to South Asia Industries Private Limited, and possession was also handed over. An application for eviction was filed under section 14 (1) (*b*) of the Delhi Rent Control Act, 1958, against Allen Berry and Company and also South Asia Industries Private Limited. During the pendency of the application, the tenant Allen Berry and Company went into liquidation and the company was struck off from the record of the proceedings. Thereafter, the application was heard and an order for eviction was passed against South Asia Industries Private Limited. An appeal was preferred therefrom which was dismissed and further proceedings before the Punjab High Court proved futile and the matter was thereupon carried on in further appeal before the Supreme Court. An argument was raised that no order for eviction could be made against a person in whose favour the tenancy had been assigned. Taking into account the definition of the term "tenant" and the provisions of section 14 (1) (*b*) of the Delhi Rent Control Act, 1958, the Supreme Court held that an assignment of the premises by the tenant is a ground of eviction of both the assigning tenant and the assignee and in the event of an assignment without the consent in writing of the landlord, the Controller has jurisdiction to make an order for possession not only against the assigning tenant, but also against the assignee. It was also further held that though the assigning tenant, a company, had gone into liquidation and ceased to be a party to the proceedings, an order for eviction could still be made against the assignee. The principles laid down by the Supreme Court in the aforesaid decision would also apply to the facts of the present case. The sub-letting by Hussain *alias* Hallaj, in the present case, in favour of the petitioners was without the consent in writing of the respondent and that would enable the respondent to recover possession of the premises from Hussain *alias* Hallaj as well as the petitioners against whom also the application for eviction had been properly filed. If such a right had accrued to the respondent, that cannot be taken away merely on account of the death of

1. (1966) 1 S.C.J. 186: (1965) 3 S.C.R. 829.

Hussain *alias* Hallaj. The object of the legislation would only be furthered and fulfilled by enabling a landlord to recover possession of the premises even as against the sub-tenants after the death of the main tenant on the footing that the sub-tenants represent the interest of the main tenant. Even for the purpose of section 2 (*ii*), Code of Civil Procedure, it has been held that it is not always a legal requisite that, inevitably only the heirs, all of them or any of them, should figure as legal representatives and that the procedural law requiring representation will stand satisfied if there is substantial representation in the sense that all that could be done in defence is done by someone interested in the issue. (Vide *Subramania Pillai* v. *Masterly*[1]). In the present case, the petitioners who are in possession of portions of the premises attempted to defeat the application for eviction filed by the respondent on the ground that they are direct tenants of the respondent and in that attempt they failed. In that context, the interest of Hussain *alias* Hallaj had been more than amply represented by the petitioners and since they had already been made parties to the proceedings, there could not be any impediment in the way of the proceedings being continued even after the death of Hussain *alias* Hallaj. Having regard to these considerations, on the facts of the present case, it seems to me that the decision in *Guruswami Nadar* v. *Natesa Nadar*[2], relied upon by the learned counsel for the petitioners cannot have any application. The authorities below were, therefore, quite right in having ordered the eviction of the petitioner. The concurrent finding of the authorities below is amply supported by the evidence on record and does not deserve to be interfered with in the exercise of the revisional jurisdiction under section 25 of the Act. Consequently, the order of the authorities below is confirmed and the civil revision petition is dismissed with costs.

S.J. —— *Petition dismissed.*

1. (1976) I M.L.J. 341: A.I.R. 1976 Mad. 303.
2. (1969) 2 M.L.J. 488.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

P. S. Guna Kumar and others .. *Petitioners**

v.

The Ramamurthy Metal Decorating Industries Private Limited through its Managing Director, A. Ramamurthi 74|1, Police Station Road, Sivakasi and others .. *Respondents.*

and

Thiruppathi Venkatachalapathi Lorry Service, Sattur through one of its partners, N. Rathinaswami Nadar .. *Petitioner*

v.

Ravi Paints and Chemicals Ltd., through its Managing Director, U. S. K. D. Rajan S|o. V. S. K. Doraiswami Nadar, at 85|87, Armenian Street, Madras-1 and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 8-*A*, *rule* 8—*Suit for recovery of money for goods supplied—Plaintiff in Sivakasi supplying tin containers to first defendant in Madras—Tin containers damaged in transit — Defendant refusing to pay for the containers — Suit by plaintiff against the first defendant and the carriers — First defendant filing a petition under Order* 8-*A*, *rule* 8 *of the Civil Procedure Code, against the carriers — Petition allowed — Revision by carriers dismissed —* Held, *carriers would be liable for costs or injury to the goods in the course of transit.*

The first defendant at Madras placed an order with the plaintiff at Sivakasi for the purchase of tin containers manufactured by the plaintiff. The plaintiff accepted the order and entrusted the second defendant, a public carrier at Sivakasi, for transport and delivery to the first defendant. The second defendant entrusted the goods to be transported in a lorry belonging to defendants 3 to 5. All the supplies made by the plaintiff to the first defendant were only F. O. R., Sivakasi.

*C.R.P. Nos. 2160 and 2465 of 1981.
7th July, 1981.

The goods were damaged in transit and the first defendant refused to pay for the tin containers. Thereupon the plaintiff filed a suit against the defendants. The first defendant filed a petition under Order 8-A, rule 8 of the Civil Procedure Code and prayed for a cross-decree against defendants 3 to 5, the carriers. This petition was allowed. Aggrieved by this, the carries filed a revision.

Held: A common carrier is an insurer of goods which he contracts to carry and he is liable for all loss of, or injury to the goods, while they are in the course of transit unless such loss or injury is caused by act of God, or by the State enemies or is the consequence of inherent vice in the thing carried or is attributable to consignor's own fault.

[*Para*. 8.]

In the instant case, the defendants 2 to 5 as carriers, if they were proved to have been entrusted with the containers for transport, and if the containers were proved to have been damaged in the course of the transit, were liable in law and equity to make good the loss sustained by the first defendant, if the ownership of the goods was found to have passed to the first defendant and if a decree was passed against the first defendant and in favour of the plaintiff. [*Para*. 18.]

Cases referred to:—

Eastern Shipping Company Ltd. v. *Quash Beng Kee*, (1924) A.C. 177; *Waring* v. *Ward*, 7 Ves. 332; *S. Sabulal Sahib* v. *N. Perianna Pillai*, (1957) 2 M.L.J. 55: 70 L. W. 493 (2): A.I.R. 1957 Mad. 679; *Thiruvannamalai Adhinam Sri Daivasigamani Arunachala Desika Paramacharya Swamigal*, In re, (1955) 68 L.W. 371: A.I.R. 1955 Mad. (N.U.C.) 3910; *Parasmal Chordia* v. *Rajalakshmi Ammal*, (1969) 1 M.L.J. 168: 82 L.W. 134: A.I.R. 1970 Mad. 47; *Uthaman Chettiar* v. *Thiagaraja Pillai*, (1955) 68 L.W. 810: A. I. R. 1956 Mad. 155; *Muniandi* v *Selvarajan*, (1968) 2 M. L. J. 12; *Rangaswami* v. *Ramaswami*, (1971) 84 L.W. 25: A.I.R. 1971 Mad. 328.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Principal Subordinate Judge, Ramanathapuram at Madurai, dated 2nd July, 1980, and made in I.A. No. 462 of 1979 in O.S. No. 240 of 1978.

A. Ramanathan, for *S. M. Hameed Mohideen* and *Ashraf Ali*, for Petitioners.

P. Pandi, S. Sampath Kumar and *M. Veluswamy*, for Respondent.

The Court made the following

ORDER.—C.R.P. No. 2465 of 1980 has been preferred by the second defendant and C.R.P. No. 2160 of 1980 has been preferred by defendants Nos. 3 to 5 against an order passed by the trial Court in favour of the first defendant on an application under Order 8-A, rule 8 and section 151 of the Code of Civil Procedure, directing that the question of indemnity or contribution as between the petitioner, the first defendant, and defendants 2 to 5 may also be tried in the same suit. The suit, O.S. No. 240 of 1978 has been instituted by Ramamurthy Metal Decorating Industries (P.) Ltd., against the defendants. The first defendant placed an order with the plaintiff for the purchase of tin containers manumactured by the plaintiff. The first defendant placed the order for supply of 2,000 numbers of 5 kilos Ravico Printed tin containers with lids and capsules on 28th October, 1976. Subsequently a letter, dated 10th November, 1976 was sent to the plaintiff by way of reminder. The order placed by the first defendant was accepted by the plaintiff at Sivakasi. The plaintiff had supplied tin containers to the first defendant on earlier occasions also. All the supplies made by the plaintiff to the first defendant were only F.O, R. Sivakasi. The lorry freight had been paid all along by the first defendant. The plaintiff manufactured the containers and packed them in good condition and delivered them on 18th November, 1976 for transport by a lorry bearing number MDT 7033. They were entrusted to the second defendant, who is a public carrier at Sivakasi, for transport and delivery to the first defendant. The second defendant sent the containers by lorry bearing number MDT 7033 to Madras. An invoice drawn in favour of the first defendant (No. 274, dated 18th November, 1976) was duly handed over to the driver of the lorry. The goods were delivered to the driver in good condition and the vouchers Nos. 0761 and 0762 were obtained from the driver of the lorry. The plaintiff made out invoice No. 274, dated 18th November, 1976 for the goods supplied and sent the invoice to the first de-

fendant for payment of Rs. 24,077-16. The goods were delivered to the first defendant and the frieght payable for transport was paid by the first defendant to the driver of the lorry MDT 7033.

2. Subsequently, by a telegram, dated 22nd November, 1976, the first defendant informed the plaintiff that all the containers sent by the plaintiff were found damaged and this was followed by up by a letter complaining that the containers sent by the plaintiff were all badly damaged. The plaintiff was requested to send their representative to inspect the damaged goods. It was also alleged by the first defendant that the goods had not been properly packed, that the packets had been badly handled by the carriers and that the packets had been dropped and lodged with heavy materials over the top of them. As advised by the first defendant, the plaintiff lodged a complaint with the second defendant on 24th November, 1976 and a copy of the same was marked to the first defendant. The contention of the plaintiff is that the title in the goods had passed to the first defendant and the plaintiff can in no event be held liable for any damage caused to the goods during transit. The goods were inspected on behalf of the plaintiff and some of the containers were found to have been damaged. The representative of the plaintiff advised the first defendant to pick out the undamaged containers and use them and to proceed against the carriers for the damage. After the inspection by the representative of the plaintiff, the first defendant sent a letter to the plaintiff on 24th November, 1976 requesting the plaintiff to lodge the insurance claim immediately. The representative of the plaintiff told the first defendant that he would replace the damaged containers after consulting the Managing Director. The carriers would appear to have written two letters, dated 8th December, 1976 and 10th December, 1976, contending that the first defendent is only a consignee and that the plaintiff, as the consignor, is entitled to lodge the complaint with the carriers and claim damages.

3. The second defendant wrote a letter on 11th December, 1976 in reply to the letters of the plaintiff, dated 24th November, 1976 and 3rd December, 1976 stating that the matter was receiving attention and that after perusing the records, a reply would be sent. However, no reply was sent to the plaintiff till the date of institution of the suit. Meanwhile, the first defendant was requesting the plaintiff to take back the damaged containers and replace them by fresh consignment. The plaintiff disowned liability and demanded payment from the first defendant. The first defendant did not pay the amount due under the invoices. On 5th July, 1977 the first defendant returned the entire consignment by door delivery to the plaintiff through M|s. S. R. M. Transport. The said S. R. M. Transport unloaded the goods in the factory premises of the plaintiff when there were no responsible officers of the plaintiff's company, and since, then the goods are lying in the factory of the plaintiff, as according to the plaintiff, the goods of the first defendant. The first defendant also sent a letter to the plaintiff stating that he has returned 72 empty containers and 8 cartons of lids and capsules as they were received in a damaged condition. Therefore, the claim has been put forward in the suit against the first defendant.

4. On 4th May, 1977, the plaintiff received a copy of a registered notice sent by the second defendant to defendants 3 to 5. The second defendant entrusted the goods sent by the plaintiff to the first defendant to be transported in a lorry belonging to defendants 3 to 5. The second defendant made out vouchers bearing No. 0761 and 0762 and entrusted the goods to one A. Karuppiah, the driver of a lorry owned by defendants 3 to 5. The said lorry met with an accident and the damage to the goods referred to above was a result of that accident. The contention of the plaintiff is that if for any reason the Court is to come to the conclusion that the plaintiff has to look to the second defendant only for collecting the value of the goods, the suit may be decreed as against the second defendant. It is further contended by the plaintiff that "In view of the notice issued by the second defendant to defendants 3 to 5, that it was through their public carrier the goods were transported by the second defendant, they were also equally liable to pay the value of the goods to the plaintiff, or if it is held that the first defendant is not liable to pay the amount claimed in the plaint". Hence defendants 3 to 5 are added as parties to the suit.

5. The first defendant has filed a petition under Order 8-A, rule 8 of the Code of Civil Procedure. The contention of the first defendant is that if the Court comes to the conclusion that at the time of the loss of the goods in the custody of the lorry, the property in those goods had passed on to the first defendant and that the first defendant would be liable to pay the suit amount, then the first defendant is entitled to get a cross decree for the entire amount against defendants 3 to 5 as they are liable to indemnify, reimburse and|or contribute fully any amount that the first defendant-company will be obliged to pay the plaintiff under the decree that may be passed by the Court.

6. This petition was opposed by respondents 2 to 4, that is to say, defendants 3 to 5, *inter alia* on the ground that defendants 4 and 5 have nothing to do so with the lorry of the third defendant, that there is no implied or express guarantee of indemnity, and, therefore no decree can be passed against them, in case the first defendant is found liable to pay the damages claimed by the plaintiff.

7. The petition under Order 8-A, rule 8, Civil Procedure Code, having been allowed, this revision has been filed.

8. The question whether the lorry in which the containers were carried belonged to defendants 3 to 5 need not be gone into and cannot be gone into at this stage. It is a matter for evidence and proof by the 1st defendant. The question to be considered is, whether defendants 3 to 5 are liable to indemnify the first defendant if the containers consigned in the lorry belonging to defendants 3 to 5 were damaged in the course of transit. A common carrier is an insurer of goods which he contracts to carry and he is liable for all loss of, or injury to these goods, while they are in the course of transit unless such loss or injury is caused by the act of God, or by the State enemies or is the consequence of inherent vice in the thing carried or is attributable to consignor's own fault. It is not the contention of defendants 2 to 5, that they are absolved of their liability as carriers, if they are carriers, by reason of the fact that the damage was due to any act of *vis major* or inherent vice in the goods etc. If defendants 3 to 5 are the owners of the lorry and carriers of the goods concerned, they had received the goods upon an implicit understanding to deliver them to the consignee in the same condition in which the containers were taken delivery of by them. On their failure to do so, they are liable in damages.

9. The learned counsel for the revision petitioner contends that there was no contract by which defendants 3 to 5 promised to save the first defendant from loss caused to him by their conduct or by the conduct of any other person and that there was no contract of indemnity. The expression "indemnity" in Order 8-A, Civil Procedure Code, is not to be understood as confined to an indemnity arising out of a contract contemplated by section 124 of the Indian Contract Act. The right to indemnity may arise from a contract, express or implied.

10. In *Eastern Shipping Company Limited* v. *Quash Beng Kee*[1]. The Privy Council has laid down that:

> "Though a right of indemnity generally arises by contract, express or implicit, it exists whenever the relation between parties is such that either in law or in equity there is an obligation upon one party to indemnity another".

The facts of the case and the principles have been stated in the head note as follows:—

> "The owners of a wharf granted the appelland company the right to berth their ships at it subject to payment and liability for any damage caused. The respondent, who was managing director of the appellant-company, gave instruction, without the company's authority, that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was unloaded the wharf collapsed. In an action by the owners of the wharf against the appellant company for damages, they served a third party notice upon the respondent, and claimed that he should indemnify them against any damages for which they should be held liable. By the rules of Court applicable (as by R. S. C., Order 16, rule 48) third party procedure is available 'where a

1. (1924) A.C. 177.

defendant claims to be entitled to contribution or indemnity over against a person:—

Held, that the appellant company had a right of indemnity against the respondent, and were entitled to join him as a third party and claim relief against him".

It has been further laid down in the decision cited above that:

"A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or equity there is an obligation upon the one party to indemnity the other. There are, for instances, cases in which the state of circumstance, is such that the law attaches a legal or equitable duty to indemnity arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnify need not arise by contract, it may (to give other instance) arise by statute, it may arise upon the notion of a request made under circumstance from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him, it may arise (to use Lord Eldon's words in *Waring* v. *Ward*[1], a case of vendor and purchaser) in cases in which the Court will 'independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation of the vendor".

11. In *S. Sabulal Sahib* v. *N. Perianna Pillai*[2], Rajamannar, CJ., has laid down that the trial Judge:

"was wrong in dismissing the application under Order 8-A, rule 1 of the Code of Civil Procedure, on the ground that there is no privity of contract between the plaintiff and the third party. Generally speaking, there will not be such a privity in a claim falling under Order 8-A which the defendant sets up against a third party. If there was direct privity then the third party would have been a necessary party".

1. 7 Ves. 332, 336.
2. (1957) 2 M.L.J. 55: 70 L.W. 493 (2): A.I.R. 1957 Mad. 679.

12. It has been laid down by Ramaswami, J., in In re, *Thiruvannamalai Adhinam Sri Daivasigamani Arunachala Desika Paramacharya Swamigal*[1], that:

"The third party procedure is applicable only to cases of contribution or indemnity. In effect, a claim to contribution is a claim to a partial indemnity. Contribution is bottomed and fixed on general principles of justice and does not spring from contract, though contract may qualify it; A right to contribution may be created by statute.. A right to indemnity may arise; (*i*) from express contract; (*ii*) from som statute; or (*iii*) implied from some principle of law.

A right to indemnity exists where there is an obligation either in law or in equity upon one party to indemnity the other, an insurer can be added as a third in an action for personal injury in a road accident as the defendant is entitled to indemnity from that party".

13. In the instant case, defendants 3 to 5 as carriers are liable for all loss of or injury to the goods which had occurred while the containers were in the course of transit unless they could avoid their liability by reason of the loss or injury having been caused by the act of God, etc., referred to above. The common carrier cannot obliterate or destroy its character as a common carrier, and defendants 3 to 5 if they are proved to be common carriers, are liable to pay damages for loss of consignment, and hence liable by statute to indemnify the first detendant. The relief claimed by the first defendant against defendants 2 to 5 is substantially the same as the relief claimed by the plaintiff.

14. In *Parasmal Chordia* v. *Rajalakshmi Ammal*[2], Veeraswami, J. (as he then was), considered the case of a claim laid upon a promissory note said to have been executed by the defendant, who resisted the suit on the ground that the promissory note was not supported by consideration and also maintained that the plaintiff's son had executed an agreement or varthamanam admitting that the

1. (1955) 68 L.W. 371: A.I.R. 1955 Mad. (N.U.C.) 3910 at 3911.
2. (1969) 82 L.W. 134: (1969) 1 M.L.J. 168: A.I.R. 1970 Mad. 47.

promissory note was not supported by consideration and that, in case, it was successfully enforced, he would indemnify the defendant. On the basis of these averments, the defendant in that case took out an application under Order 8-A, Civil Procedure Code, for third party notice to the son of the plaintiff. The application was dismissed by the Subordinate Judge, who relied on the ratio of *Uthaman Chettiar* v. *Thiagaraja Pillai*[1]:

15. In the circumstances, the learned Judge observed as follows:—

> "With due respect to the learned Judge the limitation placed by him does not appear to be justified, by the language of rule 1 of Order 8-A. The order relates to third party procedure and the first rule says that where a defendant claims to be entitled to contribution from or indemnity against any person, not already a party to the suit, he may, by leave of the Court, issue a notice, called a third party notice, to that effect. That simply means that where in a suit the defendant in case the plaintiff succeeds, is entitled to indemnify from a third party, who has not been already brought on record, he is entitled to ask for a third party notice. There is nothing in the rule suggesting that it has no application to suits on negotiable instruments.
>
> It is urged that the rule is applicable only to a claim of indemnity arising out of the same transaction or a transaction entered into simultaneously with the transaction sought to be enforced in the suit. The answer is rule 1 itself contains no such limitation. Nor does the reason of the rule demand such a limitation. The rule is conceived for the benefit of a defendant who, if defeated in respect of a claim against him, is entitled to reimbursement by way of indemnity. In such a case the policy of the rule is that the defendant need not be driven to a fresh suit to put indemnity into operation. That, in my view, should be the approach to the procedure for third party notice.
>
> The further contention for one of the respondents is that Order 8-A itself will be attracted only in cases where a defendant admits liability on the main transaction sued upon. Support is sought to be derived, for this contention, from rule 3 of Order 8-A. This rule only states that if the third party desires to defend himself he may do so, but, if he does not enter appearance, he shall be deemed to admit the validity of the decree against the defendant and his own liability to indemnity to the extent claimed in the third party notice. This does not mean that rule 3 limits the scope of rule 1 so as to make it applicable only to cases where the suit claim is admitted".

16. In *Muniandi* v. *Selvarajan*[1], Ramaprasada Rao, J. (as he then was), held that:

> "Order 8-A of the Civil Procedure Code (V of 1908) prescribed a special method by which a party-defendant could secure relief without independently filing a suit against a third party to the suit, if he makes out a case that such third party is bound to indemnify him in connection with the suit transaction. Indemnity referred to in Order 8-A need not necessarily spring from contract".

17. In *Rangaswami* v. *Ramaswami*[2], Ramanujam, J., has taken a similar view, and has held that the liability to indemnify need not arise from contract.

18. In the instant case, defendants 2 to 5 as carriers, if they are proved, to have been entrusted with the containers for transport, and if the containers are proved to have been damaged in the course of the transit, are liable in law and equity to make good the loss sustained by the first defendant, if the ownership of the goods is found to have passed to the first defendant and if a decree is passed against the first defendant and in favour of the plaintiff.

19. Therefore, the order of the Court below allowing the petition under Order 8-A, rule 8, Civil Procedure Code, is perfectly correct and is confirmed. These civil revision petitions are dismissed with costs. (Two sets).

S.J. ——— *Petitions dismissed.*

1. (1955) 68 L.W. 810: A.I.R. 1956 Mad. 155.

1. (1968) 2 M.L.J. 12.
2. (1971) 84 L.W. 25: A.I.R. 1971 Mad. 328.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

Masilamani Udayar .. *Petitioner**

v.

Ramakrishna Chettiar .. *Respondent.*

Tamil Nadu Debt Relief Act (XIII of 1980), section 3 (d)—Debtor — Definition — Sale proceeds of a property, whether can be reckoned as income — Words and Phrases — "Income".

Held, since there is no definition of the term 'income' in Tamil Nadu Act XIII of 1980, the dictionary meaning of the term has to be looked at. Income in its very nature relates to something received annually for the work done or anything received by way of income from the properties owned by a person. [*Paras.* 3, 8.]

On a due consideration of the meaning of the word 'income' given in the several dictionaries and Law Lexicon and the interpretation of the word in the decisions, the sale proceeds resulting from the sale of lands cannot be termed as an income of the judgment-debtor. The judgment-debtor is not precluded for that reason from the benefits of Act XIII of 1980. [*Para.* 12.]

Cases referred to:—

Ramaswami v. *Commissioner of Income-tax,* I.L.R. (1959) Mad. 126; *Commissioner of Income-tax* v. *Shaw Wallace,* (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: 36 L.W. 63: A.I.R. 1932 P.C. 138; *Vulcan Insurance Company Ltd.* v. *Corporation of Madras,* (1930) 58 M.L.J. 337: 31 L.W. 438: A.I.R. 1930 Mad. 626 (2).

Petition under section 115 of the Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Tiruvannamalai, dated 18th December, 1980 and made in R.E.P. No. 106 of 1980 in O.S. No. 27 of 1980.

M. Srinivasan, for Petitioner.

M. V. Chandran, for Respondent.

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*C.R.P. No. 691 of 1981.

16th October, 1981.

The Court made the following

ORDER.—This civil revision petition is filed by the judgment-debtor against the judgment in R.E.P. No. 106 of 1980 in O.S. No. 27 of 1980 on the file of the Subordinate Judge of Tiruvannamalai holding that the judgment-debtor is not a debtor as defined under section 3 (*d*) of Act XIII of 1980. The respondent herein obtained a decree against the revision petitioner for recovery of Rs. 8,425 in O.S. No. 27 of 1980 and filed R.E.P. No. 106 of 1980 for the realisation of the said amount by attachment and sale of the properties belonging to the judgment-debtor. The judgment-debtor|revision petitioner filed a counter statement contending that he is a debtor as defined under Act XIII of 1980 and as such he is entitled to protection under the above-said Act. The learned Subordinate Judge came to the conclusion that the judgment-debtor is not a debtor as defined under the Act since during the relevant period the judgment-debtor had sold his landed properties for Rs. 17,750 and the amount received by way of sale proceeds has to be reckoned as the income and as such the income of the judgment-debtor exceeds the sum of Rs. 4,800. As against the order of the learned Subordinate Judge, holding that the judgment-debtor is not a debtor as defined under Act XIII of 1980, civil revision petition is filed.

2. Mr. M. Srinivasan, advocate appearing on behalf of the revision petitioner, contends that Rs. 17,750 the sale proceeds of the landed properties of the judgment-debtor cannot be treated as the annual household income as defined in section 3 (*a*) of Act (XIII of 1980), which reads as follows:—

> " 'annual household income' means the aggregate of the gross annual income from all sources of all the members of a family during the year ending on the 31st December, 1979".

As per the section, household income means the aggregate of the gross annual income from all sources of all the members of a family during the year ending 31st December, 1979. But the term 'income' had not been specifically defined in any of the sections of the abovesaid Act.

3. In construing the term 'income' occurring in Income-tax Act (XI of 1922), it has been laid down by a Division Bench of this Court

in a case reported in *Ramaswami* v. *Commissioner of Income-tax*[1], that:

"In the absence of a statutory definition we must take its ordinary dictionary meaning—'that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money); annual or periodical receipts accruing to a 'person or Corporation' (Oxford Dictionary). The word clearly implies the idea of receipt, actual or constructive".

Since there is no definition to the term 'income' in Act XIII of 1980, we will have to only fall back to the dictionary meaning of the word 'income' and find out whether the sale proceeds of the lands can be termed as an income.

4. The meaning of the word 'income' as defined in the Shorter Oxford English Dictionary is as follows:

"That which comes in as the periodical produce of one's work, business, lands, or investments (commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation, revenue".

5. In the Longman Dictionary of Contemporary English, (International Students edition published in 1980) the meaning of the word 'income' is given as follows:

"Money which one receives regularly for one's daily spending, usually payment for one's work, or interest from investments".

6. In the Webster's New Twentieth Century Dictionary (1979 Edition) the meaning of the word 'income' is given as follows:—

"money periodically received for labour or services, also money received from the rental of property, the proceeds of business the profits of commerce, interest on lease, etc., revenue".

7. In the Law Lexicon and Legal Maxims of Venkataramaiya (1980 Edition), the meaning of the word 'income' is defined as:

"That which comes in as the periodical produce of one's work, business, lands or investments (commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation; revenues".

It is also stated in the Law Lexicon that:

"The expression 'income' in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money. Income arises when the commodity is disposed of by sale, consumption or use in the manufacture or other processes carried on by the assessee *qua* that commodity. There is no reason to think that the expression 'income' in the Madras Plantations Agricultural Income-tax Act, 1955 has any other connotation".

8. Taking into consideration the meaning given in the several dictionaries and the Law Lexicon, it cannot be said that the sale proceeds of Rs. 17,750 received by the judgment-debtor is an income derived by him. Income in its very nature relates to something that is received annually for the work done or anything received by way of income from the properties owned by a person.

9. The learned Advocate for the respondent draws my attention to the passage in the Law Lexicon, extracted above, where it is mentioned that 'income' also connotes the proceeds received by sale of commodities by a particular person and contends that the proceeds realised from the sale of lands also will have to be treated as the income of the judgment-debtor. The sale of a commodity cannot be equated to the sale of an immovable property, *viz.*, lands. Hence the passage in the Law Lexicon will not in any way help the case of the respondent.

10. In a case reported in *Commissioner of Income-tax* v. *Shaw Wallce*[1], the Privy Council had occasion to deal with the term 'Income' occurring in the Income-tax Act of 1922. During the course of the judgment, the Privy Council observed as follows:—

1. I.L.R. (1959) Mad. 126.

1. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: 26 L.W. 63: A.I.R. 1932 P.C. 138.

"The object of the Indian Act is to tax 'income' a term which it does not define. It is expanded, no doubt, into 'income' profits and gains', but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to the continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere wind-fall. Thus income has been linked pietorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as 'capital'. But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

11. In a case reported in *Vulcan Insurance Company Limited* v. *Corporation of Madras*[1], a Division Bench of this Court has adopted the meaning given in the Oxford Dictionary, where income is described as "periodical receipts" from one's work, lands, investments etc.

12. On a due consideration of the meaning of the word 'income' given in the abovesaid several dictionaries and Law Lexicon and the interpretation of the word in the abovesaid decisions, I have no hesitation in coming to the conclusion that the sale proceeds cannot be termed as an income of the judgment-debtor. Hence, the learned Subordinate Judge is in error in treating the sale proceeds of the land as an income and holding that the judgment-debtor is not entitled to the benefits of Act XIII of 1980. Consequently, the order of the learned Subordinate Judge is liable to be set aside.

13. But Act XIII of 1980 had been subsequently amended by means of Act X of 1981 by which several provisos are added to the effect that the protection afforded under the Act is taken away in respect of persons, who are assessed to income-tax in the two financial years immediately preceding the 1st day of April, 1979, or assessed to sales tax in the two financial years immediately preceding the 1st day of April, 1979, or who have been assessed to property tax or wealth tax in respect of buildings or lands other than agricultural lands under Tamil Nadu District Municipalities Act, 1920 or Tamil Nadu Panchayats Act, 1958, provided that the aggregate annual rental value of such building and lands is not less than Rs. 1,200, or who have been assessed to profession tax in all the four half-years, immediately preceding the 1st October, 1979, Act X of 1981, by which these provisos were added to section 3 of Act XIII of 1980, is deemed to have come into force on the date of Act XIII of 1980 itself. In view of the subsequent amendment the question, whether the judgment-debtor is entitled to protection under Act XIII of 1980 as amended by Act X of 1981, will have to be considered afresh by the lower Court.

14. Hence the order of the learned Subordinate Judge is set aside, the civil revision petition is allowed, and the matter is remitted back to the Subordinate Judge of Tirunevelli for fresh disposal in the light of the observation made above. There will be no order as to costs.

R.S. —— *Petition allowed.*

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1. (1930) 58 M.L.J. 337: 31 L. W. 438: A.I.R. 1930 Mad. 626 (2).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

S. S. S. A. Vivekanandam .. *Petitioner**

v.

S. V. Kamala Bai .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *as amended by Act (XXIII of* 1973), *section* 18 (2)—*Landlord obtaining order of eviction seeking to execute the same—Tenant contending decree to be a nullity—Rent Controller rejecting the contention and proceeding with execution — Revision by tenant against order of the Rent Controller—Preliminary objection by landlord regarding the maintainability of revision upheld.*

Held: Section 18 (1) of the Tamil Nadu Buildings (Lease and Rent Control) Act provides that an order of eviction shall be executed by the Controller as if such order is an order of a civil Court. The same provision enacts that for the purpose of execution of the eviction order the Rent Controller shall have all the powers of a civil Court. Section 19 (2) also lays down that an order passed in execution under section 18 (1) "shall not be subject to any appeal or revision".

[*Para.* 3.]

Every order passed by the Rent Controller while disposing of an execution petition must be regarded as "an order passed in execution under sub-section (1) of section 18". The bar under section 18 (2) is an absolute prohibition. As such the present revision petition against the Controller's order rejecting the tenant's plea in execution that the order of eviction was a nullity is not competent. [*Paras.* 5. 7.]

Case referred to:—

C. Mackertich v. *Stewart & Co. Ltd.*, A.I.R. 1970 S.C. 839.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of Small Causes (VII Judge) Madras in H.R.C. No. 257 of 1970.

K. Ramaswami, for Petitioner.

P. Venkatachalapathy, for Respondent.

The Court made the following

ORDER.—The petitioner before me is the tenant of a building from which he was ordered to be evicted by an order of the Rent Controller. This order has been sustained in appeal and thereafter in revision by this Court. The landlord sought to execute the order of eviction by filing an execution petition before that Rent Controller under section 18 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, (hereinafter referred to as the Rent Control Act). The execution petition was opposed by the tenat on the score that the order of eviction itself was nullity. The contention was based on the nature of the lease. According to the tenant, he was inducted into the tenancy of the building under a registered lease deed, dated 14th June, 1967, under which he was to be a lessee in possession for a fixed term of 21 years. The contention was that in respect of a lease for a term of years there cannot be any proceedings for termination of the tenancy or eviction of the tenant in mid-term. The Rent Controller rejected these contentions and proceeded with the execution.

2. The revision has been filed by the tenant treating the order of the Rent Controller, in execution as an order passed under section 47 of the Code of Civil Procedure. When the revision was taken up for hearing, learned counsel for the respondent-landlord raised a preliminary objection. He urged that under section 18 (2) of the Rent Control Act, against any order passed by the Rent Controller in execution of an order of eviction, no appeal and no revision lies. I think, I must sustain this preliminary objection.

3. Section 18 (1) provides that an order of eviction shall be executed by the Controller as if such order is an order of a civil Court. The same provision enacts that for the purpose of execution of the eviction order the Rent Controller shall have all the powers of a civil Court. Having provided for the procedure for execution in the manner aforesaid, section 18 (2) lays down that an order passed in execution under section 18 (1) "shall not be subject to any appeal or revision."

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*C.R.P. No. 303 of 1979.

27th November, 1981.

4. In this case, the Rent Controller rejected the application of the tenant for declaring the eviction order a nullity. This order of the Rent Controller, in my judgment, is an order passed in execution under section 18 (1) of the Act. It follows, therefore, that under section 18 (2) of the Act, the present revision against that order is barred.

5. Learned counsel for the tenant submitted that the bar under section 18 (2) operated only in a case where the order sought to be revised is an order "passed in execution". According to learned counsel in a case where the Rent Controller declines to declare an order of eviction as a nullity, that order cannot be regarded as "an order passed in execution", within the meaning of section 18 (2). I do not accept this contention as being based on a true construction of section 18 (2). To accept the argument of learned counsel would lead to curious results. For, on that interpretation if the Rent Controller dismissed an execution petition, then a revision would be available whereas, if he allows an execution petition, a revision will not be available. I do not think that the bar under section 18 (2) can be made to depend on the nature of the order passed by the Rent Controller under section 18 (1) of the Act. In my opinion, every order passed by the Rent Controller while disposing of an execution petition must be regarded as "an order passed in execution under sub-section (1)" of section 18.

6. Learned counsel for the tenant referred to a decision of the Supreme Court reported in *C. Mackertich* v. *Stewart and Company Limited*[1]. In that case the Supreme Court upheld the maintainability of a revision where the revision was filed by a tenant against whom execution was levied. The contention of the tenant in revision was that the eviction was a nullity. The Supreme Court upheld the maintainability of the revision, obviously under section 115 of the Code of Civil Procedure. This case however, cannot serve as a precedent for the present case. The case before the Supreme Court arose out of a suit between a landlord and a tenant in which a decree in ejectment was passed against the tenant. At the execution stage the tenant pleaded the decree to be a nullity. When that plea was rejected by the Executing Court, he sought to file a revision to the High Court under section 115 of the Code. It was while examining the maintainability of such a revision that the Supreme Court had rendered their decision. With respect, the decision is understandably correct, since the revision in that case arose out of proceedings in execution of a decree in ejectment passed in an ejectment suit. Such is not the case in the present proceedings. This case is the very obverse. In any case the matter has got to be considered not under section 115 of the Code, but wholly on an interpretation and application of section 18 (2) of the Rent Control Act.

7. Section 18 (2) happens to have been construed and applied by this Court in this very case between the same parties in connection with an earlier order in execution passed by the Rent Controller. That decision was in C.R.P. No. 1769 of 1979. In that case Venugopal, J., upheld a similar preliminary objection to the maintainability of a revision under section 18 (2) of the Rent Control Act against an order passed by the Rent Controller in execution. The learned Judge described the bar under section 18 (2) as "an absolute prohibition" I respectfully agree this description.

8. For the reasons which I have earlier rendered, I uphold the preliminary objection put forward on behalf of the landlord-respondent and dismiss this petition. There will, however, be no order as to costs.

R.S. —— *Petition dismissed.*

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1. A.I.R. 1970 S.C. 839.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Suryamurthy, J.*

Thiruvallur Finance Corporation (Regd), represented by its Managing Partner, Sri V. Govinda Naidu .. *Petitioner**

v.

V. T. Subramaniam .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 6, *rule* 17—*Amendment of plaint—Suit for recovery of a sum of money—Subsequent application for amendment to sue alternatively on the original cause of action—Amendment allowable.*

Held: In the instant case, the suit promissory-note was said to have been given as a collateral security for payment of the future instalments due by the successful bidder of the chit in auction, *viz.*, the defendant. The suit promissory-note had been executed contemporaneously with the receipt of the bid amount by the defendant. Though the recital would make it that a cash of Rs. 2,500 was received, it would appear that only the bid amount, which might have been less than the amount mentioned in the suit promissory-note was received. The true nature of the transaction was not set out in the suit promissory-note. All the terms and conditions of the contract were not incorporated therein. Therefore, the plaintiff was entitled to found the cause of action on the original debt, *viz.*, the receipt of money by the defendant. In the circumstances, there would be no change in the cause of action by amending the plaint.

[*Para.* 5.]

Case referred to:—

Perumal v. *Kamakshi,* (1938) 2 M. L. J. 189: I.L.R. (1938) Mad. 933: 48 L.W. 220: A.I.R. 1938 Mad. 785.

Petition under section 115 of Act (V of 1908), praying the High Court to revise the order of the Court of the District Munsif, Tiruvallur, dated 15th February, 1980 and made in I.A. No. 2003 of 1979 in O.S. No. 771 of 1978.

D. Raju and *M. Venkatachalapathy,* for Petitioner.

O. R. Abdul Kalaam, for Respondent.

The Court made the following

ORDER.—This is a civil revision petition against an order of the Learned District Munsif, of Tiruvallur, dismissing a petition filed by the plaintiff under Order 6, rule 17 of the Code of Civil Procedure, to amend the plaint, enabling the plaintiff to sue the defendant alternatively on the original cause of action.

2. The suit was filed for the recovery of a sum of Rs. 2,813-34 due on a promissory-note dated 16th October, 1975, executed by the defendant for the consideration of Rs. 2,500 alleged to have been received in cash. The promissory-note was intended to be executed originally by the defendant as well as his wife. Subsequently, the wife did not join in the execution of the promissory-note, though it would appear to have been written as if it was executed by both the defendant and his wife. Therefore, the defendant contended in his written statement that he cannot be made liable on the promissory-note "as he agreed to be liable jointly along with other executant from whom the plaintiff failed to obtain her signature". There was no other executant except the defendant and what the defendant obviously means by referring to 'the other executant' is the person who was going to join in the execution of the promissory-note, but did not do so. In view of the stand taken by the defendant, the plaintiff sought the amendment. The plaintiff is entitled to sue upon the promissory-note and the onus is on the defendant to prove that he executed the promissory-note only on the faith that his wife will also join in the execution thereof and that otherwise, he would not have executed the promissory-note.

3. The consideration for the suit promissory-note is said to be the chit amount received in cash by the defendant after successfully bidding for the same. The suit promissory-note was, therefore, executed as a collateral security and it has not embodied all the terms of the contract. The true nature of the transaction has to be proved and the fact that the suit promissory-note has been given as a

*C.R.P. No. 1587 of 1980.

19*th June*, 1981.

collateral security would be rendered probable by the fact that it was executed contemporaneously with the receipt of the bid amount. The suit may, therefore, lie on the debt apart from the instrument.

4. In *Perumal* v. *Kamakshi*[1], the question whether a person who has lent money on a promissory-note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrower, but is inadmissible in evidence owing to a defect in the stamping, was considered by a Full Bench of this Court and Leach, CJ., speaking for the Bench, observed as follows:—

> "If the promissory-note embodies all the terms of the contract and the instrument is improperly stamped, no suit on the debt will lie. Section 91, Evidence Act, and section 35, Stamp Act, bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and where an instrument has been given as collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporanous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed".

5. In the instant case, the suit promissory note is said to have been given as a collateral security for payment of the future instalments due by the successful bidder of the chit in auction, *viz.*, the defendant. The suit promissory-note has been executed contemporaneously with the receipt of the bid amount by the defendant. Though the recital would appear to be that a cash of Rs. 2,500 was received, it would appear that only the bid amount, which might have been less than the amount mentioned in the suit promissory-note was received. The true nature of the transaction is not set out in the suit promissory-note. All the terms and conditions of the contract are not incorporated therein. Therefore, the plaintiff is entitled to found the cause of action on the original debt, *viz.*, the receipt of money by the defendant. In the circumstances, there would be no change in the cause of action by amending plaint. Hence, this, civil revision petition is allowed; the order of the learned District Munsif of Tiruvallur, in I.A. No. 2003 of 1979 in O.S. No. 771 of 1978 is set aside; and the petition for amending the plaint is allowed with costs throughout.

R.S. —— *Petition allowed.*

1. (1938) 2 M.L.J. 189: I.L.R. (1938) Mad. 833: 48 L. W. 220: A. I. R. 1938 Mad. 785.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

N. Nataraj .. *Petitioner**

v.

Gangawar Mahajana Trust by its President P. Kanniah, Coimbatore .. *Respondent.*

Tamil Nadu Court-fees and Suits Valuation Act (XIV of 1955), section 50—Permanent injunction — Suit to restrain defendants from preventing plaintiff trust from entering, holding meetings and celebrating festival in temple —Injunction granted by Court below—High Court remanding case to lower appellate Court to decide question of trust's title or interest in the temple, and collect court-fee from party found liable — Second defendant moving for appointment of Commissioner to ascertain market-value of temple—Application dismissed—Court-fee already paid held sufficient—Revision to High Court.

A trustee of a temple, or any one making a claim to the office of a trustee of a temple, thereby does not have or claim, any interest in any property as owner. The temple properties are, in the strict sense, the properties of the idol. The temple as such is an item of property, and belongs to the idol and ownership cannot be attributed to the trustee either of the temple as such or the temple properties merely for the reason that as trustee, he has the power and the authority to manage and administer those properties. [*Para.* 7.]

A temple is a temple whether it is a public temple or a sectarian temple. A temple may

*C.R.P. No. 527 of 1978. 16th *October*, 1981.

be a structure of stones or brick and mortar, but it can hardly be regarded as an item of marketable property, because as a place of religious worship, it is *extra commercium*.

[*Para.* 8.]

A temple cannot be equated to a house in the sense that it is marketable or that it has a market value. Such title as the plaintiffs claim must be regarded only as a claim consistent with their status as trustee.

[*Para.* 8.]

The lower Court was right in holding that the Court-fee already paid has been properly paid for a suit of this description under section 50 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. [*Para.* 9.]

Case referred to:—

Rajagopala Naidu v. *Ramasubramania Aiyar*, (1923) 45 M.L.J. 274: I.L.R. 46 Mad. 782: 18 L.W. 326: A.I.R. 1924 Mad. 19.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order and decretal order of the Court of the III Additional Subordinate Judge, Coimbatore, dated 24th October, 1977 and passed in I.A. No. 65 of 1977, in A.S. No. 54 of 1970 (O. S. No. 76 of 1966 D.M.O., Combatore).

N. S. Varadachari, for Petitioner.

K. Venugopal, for Respondent.

The Court made the following

ORDER.—For a disposal of this revision, some background facts may be stated. Gangawar Mahajana Trust, which is a charitable trust, instituted a suit O.S. No. 76 of 1966 in the District Munsif's Court, Coimbatore against two persons, for a permanent injunction restraining the defendants from preventing the entry of the plaintiff trust or any of its members in the temple for holding their meetings, celebrating their festivals and the like. The suit was opposed by the defendants. Although the relief claimed was for a bare injunction, the learned District Munsif appears to have covered a wider field at the trial having regard to the details of the pleadings between the parties. One of the issues raised in the suit by the trial Court was:

"Whether the Gangawar Mahajana Trust is entitled to or has any interest in Mahali Amman temple or its premises?"

The learned District Munsif answered this issue in favour of the plaintiff and also granted a permanent injunction as prayed for by the plaintiff. The 2nd defendant preferred an appeal before the Sub-Court, Coimbatore. The Sub-Court, while affirming the decree of the trial Court on the issue as to the relief of permanent injunction, declined to go into the question of title raised by the issue extracted by me earlier. On the last part of the decision of the Sub-Court, the plaintiff felt aggrieved and carried the matter in second appeal before this Court. Ismail, J., as he then was, while disposing of *Gangawar Mahajana Trust* v. *N. Natarajan*[1], observed that the Sub-Court was technically right in holding that the issue as to title did not properly arise in the suit, which was one for a bare injunction and nothing more. Nevertheless, the learned Judge thought fit to remand the case to the Sub-Court for a decision on the question as to title, since in the opinion of the learned Judge, it was proper not to drive the parties to a separate suit on the question of title. While making his order of remand in the manner aforesaid, the learned Judge also incidentally directed that if by reason of the Court below going into the question of title, there was any liability for payment of court-fee in respect of the property, the deficient court-fee on that basis may be collected from the parties both in respect of the plaint and in respect of the memorandum of first appeal.

2. After this remand, the matter came before the Sub-Court for a disposal, afresh on the issue of title. At that stage, a question was mooted as to the court-fee payable on the relief as to title. The 2nd defendant, who is the petitioner in this revision, then moved the Sub-Court for the appointment of a Commissioner to ascertain the market value of the temple and its precincts, so that the proper court-fee may be determined on the relief as to the declaration title. This application was dismissed by the Sub-Court by order, dated 24th October, 1977. It is this order which has been brought before this Court in revision.

1. S.A. No. 1552 of 1972.

3. I may first observe that it is somewhat late, in the day for me to rake up the question whether, having regard to the frame of the suit, it is worth anybody's while or the Sub-Court's while to have gone into the question of title at all, for that matter, rightly or wrongly has been concluded by the order of remand made by Ismail, J., in the second appeal, to the terms of which I have made reference earlier. I must also make it clear that in the order of remand made by Ismail, J., there is no specific finding, based on any determination of calculation, that the court-fee paid already in the Courts below was deficient under any provisions of the Court-fees Act, Ismail, J., merely made a tentative observation to the effect that, if there is any deficit court-fee, that might be collected before the parties may be allowed to join issue on the question of title before the Sub-Court.

4. In this revision, as I said, the only question is whether the Sub-Court was right in rejecting the application for appointment of a Commissioner for ascertaining the market value of the said temple and its precincts for the purpose of determination of court-fees. The learned Subordinate Judge pointed out that the dispute in the suit relates to the temple and the site on which the temple stands. He took the view that there is no such thing as the determination of any market value, once the suit property was acknowledged by the parties to be a temple. He noticed that the plaintiff had already paid court-fee on the plaint purporting to pay it under section 30 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. The learned Judge held that section 30 is an inappropriate provision, having regard to the fact that the suit property is a temple and could not be valued in terms of market value. After considering whether any other provision in the Court-fees Act would apply to a property of this kind, in respect of which relief is claimed in the suit, the learned Judge held that the court-fee would fall to be payable only under section 50 of the Act. In that view, the learned Judge held that there was no question of ascertainment of market value either by the appointment of a Commissioner or otherwise.

5. It seems to me that the learned Subordinate Judge had arrived at a correct conclusion on a proper understanding of the nature of the property in the suit and on a correct application of the relevant provisions of the Court-fees Act.

6. Learned counsel for the plaintiff, who is the contesting respondent in this revision, referred us to a very early judgment in a Full Bench of this Court in *Rajagopala Naidu* v. *Ramasubramania Aiyar*[1]. That was a case, in which the question arose, whether there was any market value for a temple, as such, for the purpose of court-fees in a suit for recovery of possession of a temple. The case arose under the Court-fees Act, 1870. A study of this Full Bench decision shows that ultimately the members constituting the Full Bench did not think fit to consider or answer the question specifically referred to them. Nevertheless the expressions of opinion of the learned Judges, who constituted the Full Bench as well as of the learned Judges who made a reference to the Full Bench, are instructive. They explain from different angles, the law on the subject. Spencer, J. and Venkatasubba Rao, J., constituted the Bench, which made the reference. Spencer, J., observed in his referring judgment, that where a plaintiff, who is a trustee of the temple, prays for possession along with other trustees, then the question of his possession should be dealt with as possession to which he is entitled in the status of trustee that is to say, without having any personal interest in the trust property; likewise the possession claimed by the temple trustee is also only such possession as the holder of the office is capable of. These observations were made by Spencer, J., in the view that the ownership of temple properties can only be vested in the idol. Venkatasubba Rao, J., in his separate referring judgment expressed a similar view when he observed that a temple, being *extra commercium,* was incapable of having a market value and court-fee cannot be demanded on the basis of ascertainment of the value of the temple in a suit for possession filed by the trustee. When the matter came before and was considered by the Full Bench, Sir Walter Salis Schwabe, the learned Chief Justice, also expressed much the same view of

1. I.L.R. 46 Mad. 782: 18 L.W. 326: (1923) 45 M.L.J. 274: A.I.R. 1924 Mad. 19.

the relationship between a trustee of a temple and the temple, as such for the purpose of the enactment relating to court-fees. He observed that a temple is non-alienable and has no market for it and hence there can be no market value, for it too, for purpose of the Court-fees Act. According to the learned Chief Justice, a suit for possession of a temple will have to be valued for purposes of court-fees under the residuary provision in the statute which lays down the court-fee for proceedings "not otherwise provided for". The other two learned Judges constituting the Full Bench agreed with the view expressed by the learned Chief Justice.

7. Although the Full Bench had clearly expressed that they were not deciding the question referred to them, the expressions, of opinion of the learned Judges, which I have briefly summarised in the foregoing paragraph, show clearly the nature of the temple as a species of property, particularly in relation to the fiscal provisions of the Couurt-fees Act. The opinion uniformly expressed by the learned Judges is to the effect that it would be inapt to regard a temple as a marketable property having or possessing a market value as such. It is also clear that a trustee of a temple, or any one making a claim to the office of a trustee of a temple, thereby does not have, or claim, any interest in any property as owner. The temple properties are, in the strict sense, the properties of the idol. The temple as such, as an item of property, also belongs to the idol and the ownership cannot be attributed to the trustee either of the temple as such or other temple properties merely for the reason that as trustee, he has the power and the authority to manage and administer those properties.

8. Learned counsel for the 1st defendant sought to make a point of distinction based on the fact that the suit temple was not claimed to be a public temple, but was claimed to be only a shrine belonging to the plaintiff-trust composed of members of a particular community. I do not think that the distinction sought to be made by the learned counsel leads to a difference in the application of the principles I have stated above. A temple is a temple whether it is a public temple or a sectarian temple. A temple may be a structure of stones or brick and mortar, but it can hardly be regarded as an item of marketable property, because as a place of religious worship, it is *extra commercium*. A temple is sometimes called a House of God but the learned Judges in the Full Bench decision have pointed out that a temple cannot be equated to a house in the sense that it is marketable or that it has a market value. It may be that the plaintiff in this case had claimed title to the temple. But they have also described themselves unmistakably as a trust. Such title, as they claim, therefore, must be regarded only as a claim consistent with their status as trustees. In that sense, the present case cannot be distinguished at all from that of a public temple, managed and administered by the temple authorities.

9. Having regard to the considerations stated above, the learned Subordinate Judge was right in holding that the court-fee already paid must be dealt with as having been properly paid for a suit of this description under section 50 of the Act. This revision is accordingly dismissed. However, there will be no order as to costs.

S.J. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Nainar Sundaram, J.*

R. V. Appaswamy .. *Petitioner**

v.

Authorised Officer (Land Reforms) Kovilpatti, Tirunelveli District .. *Respondent.*

Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), *sections* 15 (a) *and* 50 (9)—*Scope and applicability — Proceedings under the Act upto Chapter VI completed—Amount for the land acquired determined — Draft assessment roll and final assessment also completed—Amount payable for the land acquired disbursed — Attempt after lapse of* 3 *years and* 5 *months proposal by Government under section* 50 (9) *to correct entry as to final assessment — Notice quashed.*

Held: The machinery under section 50 of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, is elaborate and comprehensive. The amount for the land acquired has got to be determined at the rate specified in Schedule III as stated in section 50 (9) of the Act. There is a process for preparation and publication of the draft assessment roll, considering the objections over the draft assessment roll and then causing the publication of the final assessment roll. [*Para.* 2.]

The language of section 50 (9) being similar to that in section 15 (*a*) of the Act, the principle that the power under the latter provision only applies to mistake in the correctness not of the merits but of the form of the entry in the final settlement and that it is directed against clerical or arithmetical mistakes, as held in *Syed Rabia Beevi* v. *The Authorised Officer*, (1970) 2 M.L.J. 700: 83 L. W. 555, applied with equal force with regard to the scope of the power under section 50 (9) of the Act. The reasons given by the respondent for reopening the matter cannot be sustained in view of the principle that the power to correct a *bona fide* mistake in regard to any entry cannot take within its amplitude a power to correct mistakes on merits. The determination of the amount as per Schedule III, preparation of the assessment roll, considering the objections over the same and the publication of the final assessment roll have all been done adhering to the provisions of the Act, and the whole matter got concluded long back after an investigation into and adjudication over the merits of the case. Viewed in this light, it is not possible to countenance the notice issued by the respondent after the lapse of 3 years and 6 months under section 50 (9) as to making corrections in the final assessment roll on the ground of *bona fide* mistake and recovering the compensation already paid. [*Para.* 3.]

Case referred to:—

Syed Rabia Beevi v. *The Authorised Officer*, (1970) 2 M.L.J. 700: 83 L.W. 555.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to M.R. III|19|SKL|17-70, dated 29th March, 1979, of the Authorised Officer, Kovilpatti.

G. Ravishankar, for *R. G. Rajan* and *D. V. Sivagnanam,* for Petitioner.

A. Sadanandam, for Government Pleader, for Respondent.

The Court made the following

ORDER.—The matter arises under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act (LIII of 1961) (hereinafter referred to as 'the Act'). All the proceedings under the Act upto Chapter VI of the Act have been completed. Even the determination of amount for the land acquired by the Government has been done by the respondent. By order, dated 15th October, 1975, he determined the amount payable for the land acquired at Rs. 19,049-64p. It is admitted that the preparation and publication of the draft assessment roll and then the final assessment roll pursuant to such determination have also been completed and the amount

*W.P. No. 2135 of 1979.
26th November, 1981.

payable for land acquired has also been disbursed. Practically, after the lapse of 3 years and 5 months, the respondent has proposed to take action under section 50 (9) of the Act. In the impugned notice, dated 29th March, 1979, under section 50 (9) of the Act, the respondent has stated that the surplus lands acquired under the Act remained waste for five years immediately prior to the publication of the notification under section 18 (1) and as no income was derived from those lands then, no amount is payable for the said surplus lands, and hence it is proposed to make necessary corrections in the final assessment roll on the ground of *bona fide* mistake and recover the amount already paid. So stating, the respondent called upon the petitioner to make his representation against the proposed action.

2. Mr. G. Ravishankar, learned counsel appearing for the petitioner submits that the power under section 50 (9) of the Act is similar to the power under section 15 (*a*) of the Act and the ratio of the Division Bench of this Court in *Syed Rabia Beevi* v. *The Authorised Officer*[1], would squarely apply to the power under section 50 (9) of the Act. Section 15 (*a*) of the Act reads as follows:

"15. *Power to rectify* bona fide *mistakes and clerical errors*.—Notwithstanding anything contained in sections 12 and 14, the authorised officer, may, either of his own motion or on the application of any of the parties—

(*a*) if he is satisfied that a *bona fide* mistake has been made in regard to any entry in the final statement published under section 12 or 14, make the necessary corrections therein".

The language of section 50 (9) of the Act is practically similar as could be seen from the following extract of the said provision:—

"50 (9). The authorised officer may, if he is satisfied either of his own motion or on the application of any of the parties that a *bona fide* mistake has been made in regard to any entry in the draft assessment roll or in the assessment roll as published finally, make necessary correction therein and on such correction being made, the provisions of sub-sections (3) to (8) shall, as far as may be, apply thereto".

The machinery under section 50 of the Act is elaborate and comprehensive. The amount for the land acquired has got to be determined at the rate specified in Schedule III as stated in section 50 (3) of the Act. There is a process for preparation and publication of the draft assessment roll, considering the objections over the draft assessment roll and then causing the publication of the final assessment roll.

3. With regard to the scope of the power under section 15 of the Act, the decision of the Division Bench referred to above sets out the ratio in the following terms:—

"It seems to us that section 15, having regard to the language employed, does not amount to the usual power of revision. The power of revision is conventionally conferred by the Legislature by employing the words 'if the officer is satisfied about the legality, propriety and correctness of the order'. That is not the language of section 15. The mistake that can be corrected under section 15 (*a*) is in regard to entry in the final statement. It follows, therefore, that if the entry in the final statement is based upon the earlier decision after hearing the objections under sections 10 and 12, it is not contemplated that section 15 is to cover such a situation. Elaborate procedure has been laid down by sections 10 to 12 for preparing the draft statements, hearing objections and then after disposing of the objections publishing a final statement. Any finding that is arrived at in respect of the material entries in the form would be as a result of deciding the *pros* and *cons* in the light of the objections. If that is kept in view, it is obvious that, under section 15, it is not intended that a finding arrived at in a solemn and quasi-judicial fashion could be set at naught merely because the officer is satisfied that a *bona fide* mistake has been made. If that were the intention, the language employed in section 15 would have been different. What appears to us to be the scope of section 15 is that it applies to mistake

1. (1970) 2 M.L.J. 700: 83 L.W. 555.

in the correctness not of the merits but of the form of the entry in the final statement, just as section 15 (*b*) is directed against clerical or arithmetical mistake".

The language of section 50 (9) being similar to the language employed in section 15 (*a*) of the Act, the ratio of the Division Bench applies with equal force with regard to the scope of the power under section 50 (9) of the Act. The reasons given by the respondent for reopening the matter cannot be sustained in view of the principle that the power to correct a *bona fide* mistake in regard to any entry cannot take within its amplitude a power to correct mistakes on merits. This is exactly what the respondent has proposed to do. This violates the principle laid down by the Division Bench while construing the power to correct *bona fide* mistakes in regard to any entry under section 15 of the Act. As stated above, the determination of the amount as per Schedule III, preparation of the assessment roll, considering the objections over the same and the publication of the final assessment roll have all been done adhering to the provisions of the Act, and the whole matter got concluded long back after an investigation into and adjudication over the merits of the case. Viewed in this light, it is not possible to countenance the notice issued by the respondent and which is being impugned in the writ petition. This obliges me to interfere in writ proceedings. Accordingly, this writ petition is allowed. There will be no order as to costs.

R.S. ——— *Writ petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Iqbal and Company, by its Partner, A. Mohamed Hassim .. *Petitioner**

v.

Abdul Rahim .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), section 11 (4)—Petition for eviction on grounds of wilful default in payment of rent, requirement for personal occupation and demolition and reconstruction pending — Application under section 11 (4) filed by landlord—Failure by tenant to pay the admitted rent into Court—Petition ordered—Tenant granted time to deposit arrears—Arrears not deposited—Petition for extension of time dismissed — Appeals to Appellate Authority by tenant, one against the order in the section 11 (4) application and another against the order refusing to extend time — Appeals dismissed—Revision against dismissal not competent.

Pending a petition for eviction of the tenant on three grounds—wilful default in payment of rent, requirement for personal occupation and for demolition and reconstruction—an application was filed under section 11 (4) of the Tamil Nadu Act XVIII of 1960, contending that the admitted rent not having been paid into Court the tenant's counter-affidavit could not be entertained. The Controller allowed the application on 22nd August, 1980, and directed the tenant to deposit the rent due from 1st November, 1977 at Rs. 500 per month on or before 5th September, 1980, less arrears already paid failing which further proceedings will be stopped and the tenant directed to put the landlord in possession of the concerned building. On 4th September, 1980, the tenant filed an application asking for extension of time for two weeks. The application was dismissed on 20th September, 1980, and the tenant was directed to put the landlord in possession of the building. Appeals preferred to the lower Appellate Authority failed.

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*C.R.P. Nos. 3160 and 3161 of 1981.
26th November, 1981.

On revision to the High Court,

Held: Section 11 of the Tamil Nadu Buildings (Lease and Rent Control) Act, speaks of the payment or deposit of rent during the pendency of the proceedings for eviction. Sub-section (1) to section 11 of the Act states that unless all the arrears of rent due in respect of the building upto the date of payment or deposit is made, it would not be open to the tenant to contest an application for eviction. This is before the Original Authority. Likewise, before the Appellate Authority also, such a payment has to be made. Sub-section (2) requires the deposit of rent to be made within the time and in the maner prescribed. In the instant case, revision-petitioner-tenant was called upon to pay the rent from 1st November, 1977, at the rate of Rs. 500 per month on or before 5th September, 1980, less the admitted arrears of Rs. 3,500 already paid. It is only by virtue of this power the order dated 22nd August, 1980 came to be passed having regard to the above statutory provisions. If really the tenant was serious about his appeal, he should have deposited the arrears within the due date. [*Paras.* 5 *and* 6.]

Admittedly, at the time of preferring the appeal, the arrears had not been paid or deposited in terms of section 11 (1) of the Act. Hence, the appeals themselves should not have been entertained, apart from the fact that the order pased on 22nd August, 1980, working itself out. When the appeals themselves were incompetent, the question becomes academic whether there was justification in refusing to deposit the amount. This is because purely of the statutory provisions and one cannot import the general consideration of justice or equity in a case of this character. [*Para.* 6.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973) praying the High Court to revise the decree of the Court of Small Causes (VI Judge, Appellate Authority), Madras, dated 30th July, 1981 and made in H.R.A. Nos. 1644 of 1980 and 1662 of 1980, respectively in M.P. Nos. 404 of 1980 and 584 of 1980, respectively confirming the order, dated 20th September, 1980 in H.R.C. No. 3328 of 1978, respectively on the file of the Court of Small Causes (XIV Judges), Madras.

S. Subramaniam, for Petitioners.

Habibullah Basha, for Respondent.

The Court delivered the following

JUDGMENT.—This is a very hard case and as the saying goes 'hard case makes bad law'. Both these revisions can be dealt with under a common order. The respondent herein filed H.R.C. No. 3328 of 1978 for eviction of the revision petitioner on three grounds, namely:

1. He wilfully defaulted in payment of rent for the period from 1st July, 1977 to 31st October, 1978;

2. For personal occupation; and

3. For demolition and reconstruction.

While that application was pending, the respondent took out M.P.No. 404 of 1980 under section 11 (4) of the Tamil Nadu Buildings (Lease and Rent Control) Act contending that the admitted rent had not been paid into Court and therefore the counter of the respondent in H.R.C. No. 3328 of 1978 could not be entertained. By an order, dated 22nd August, 1980, the Rent Controller allowed that petition and directed the revision petitioner to pay the respondent herein the rent due from 1st November, 1977 till date at the rate of Rs. 500 per month on or before 5th September, 1980 less adimitted arrears of Rs. 3,500 paid, failing which all further proceedings will be stopped and that the revision petitioner will be directed to put the respondent herein in possession of the building and the Rent Controller adjourned the case to be called on 6th September, 1980. Thereafter, on the 4th Spetember, 1980, the revision-petitioner filed M.P. No. 584 of 1980 stating that since he was taking effective steps to prefer an appeal against the order, dated 22nd August, 1980 made in the above M.P., time to deposit may be extended by two weeks since certified copy had not been furnished to him. It was also stated therein that should the Court be not inclined to grant extension, the order, dated 22nd August, 1980 being conditional, will work itself out. One thing which requires to be stated which has a great bearing on the question to be decided at this stage is what was averred in the affidavit:

"Without prejudice to the petitioner's contention, the petitioner is ready and willing to deposit the entire amount into Court less the admitted arrears already paid."

This petition was dismissed on 20th September, 1980 and thereupon, M.P. No. 404 of 1980 was taken up and an order, dated 20th September, 1980 was passed to the following effect:

"The petitioner herein filed a petition under section 11 (4) of the Act praying this Court to stop all further proceedings as the respondent has failed to pay the rents before contesting the main petition. This Court by its order, dated 22nd August, 1980 directed the respondent herein to pay the arrears less the admitted arrears to the petitioner on or before 5th September, 1980, failing which all further proceedings will be stopped and the respondent would be directed to put the petitioner in possession of the property. The respondent submitted before the Court that he intends to file an appeal and prayed for operation of the stay of proceedings. This Court again by its order, dated 20th September, 1980 in M.P. No. 584 of 1980 rejected the plea of the petitioner on the ground that no stay was obtained and dismissed the abovesaid M.P. As the respondent has not complied with the order passed in M.P. No. 404 of 1980, all further proceedings are ordered to be stopped and the respondent is directed to put the petitioner in possession of the property."

2. Aggrieved by the order of eviction made under section 11 (4) of the Act and refusal to grant time, two appeals were preferred to the Appellate Authority. H.R.A. No. 1644 of 1980 is against M.P. No. 404 of 1980, while H.R.A. No. 1662 of 1980 is directed against M.P. No. 584 of 1980. They were dealt with as independent appeals and by an order of even date 30th July, 1981, on a consideration of the entire matter, both the appeals came to be dismissed. Further it requires to be stated that during the pendency of the appeals, the amount directed to be deposited in M.P. No. 404 of 1980 was deposited. Notwithstanding the same, the appeals came to be dismissed. The result was the eviction order stood. It is to revise this order C.R.P. No. 3160 of 1981 is directed against H.R.A. No. 1644 of 1980, while C.R.P. No. 3161 of 1981 is directed against H.R.A. No. 1642 of 1980.

3. The learned Advocate-General contends first and foremost that the revision petitioner in a separate application even before the expiry of the date, namely, 5th September, 1980, approached the Court for extension of time. The reason adduced for extension of time was that an appeal was being preferred. As a matter of fact, the certified copy of the order was applied for on the very date of the order, namely, 22nd August, 1980. Under those circumstances, where the revision petitioner had come forward within the due date on 4th September, 1980 itself to comply with the order expiring on 5th September, 1980, the Court in the interest of justice should have granted time. This is all the more so, because section 11 (4) of the Act does not require eviction to be passed as a conditional order since, if sufficient cause is shown as to why the deposit is not complied with, the eviction order should not be passed. In the instant case, it cannot be contended that sufficient cause was not shown. If therefore, the failure to exercise jurisdiction is improper and should the Court be inclined to direct reconsideration now, the entire arrears as directed on 22nd August, 1980, having been paid, the Rent Control application should be remitted for consideration on merits. The lower appellate authority has also gone wrong in failing to note that there was no lack of *bona fides* at all in so far as the revision petitioner seeking extension of time on a valid ground. Therefore under those circumstances, the failure to deposit the amount on or before 5th September, 1980 cannot loom large. Had the extension been granted, there would have been no scope for passing an order of eviction and therefore the original order, dated 22nd August, 1980 also has to go back. Hence the revisions have to be allowed in the interest of justice.

4. Mr. Habibullah Basha, the learned counsel for the respondent-landlord would contend that assuming for a moment that the order passed on 22nd August, 1980 is a wrong one which requires the revision-petitioner to deposit the amount as ordered on or before 5th September, 1980, the revision petitioner took a grave risk in filing an application at the 11th hour, expecting the Court to grant time. It is unlike the general cases, under Rent Control

Act, Deposit of the amount is ordered under section 11 (1) of the Act a *sine qua non* for the entertainment of the appeal. Therefore, mere willingness or readiness would not suffice. Nor again, can it be said that the subsequent deposits made during the pendency of the appeal would have the effect of militating against the order of eviction. This is a case in which the conduct of the revision-petitioner lacks *bona fides* in every sense of the term. First he would allow rent control application to be ordered *ex parte*, then have the *ex parte* order set aside, pay a sum of Rs. 3,500 and thereafter, even when directed to pay on or before 5th September, 1980 except mere assertion about his readiness or willingness, fails to deposit any amount. Therefore, the Court rightly refused to grant extension. As pointed out by the appellate authority, if the tenant was eager to avoid eviction, nothing would have been easier than to deposit the amount because such a deposit is essential even for preferring an appeal and preferring of the appeal is the only ground that was stated in the affidavit in support of the request for the extension of time. Where, therefore, the Courts below have rightly refused and exercised the discretion in favour of the revision-petitioner, this Court exercising revisional jurisdiction cannot interfere.

5. In the beginning of the judgment itself, I have observed that this is a very hard case. Normally the Courts are beset with application for the grant of extension of time in one matter or other. The only condition that is imposed or the only test on which the application is tested is, has the applicant come up before the date fixed so as to avoid the order working itself out. In this case no doubt the revision petitioner has come out on 4th September, 1980 itself praying for extension. If the matter had stood there, very much could be said in favour of the petitioner. On the contrary, it is the law which seems to be clearly against him. This necessitates me to make a detailed reference to section 11 of the Act. That section speaks of the payment or deposit of rent during the pendency of the proceedings for eviction. Sub-section (1) to section 11 of the Act states that unless all the arrears of rent due in respect of the building upto the date of payment or deposit is made, it would not be open to the tenant to contest an application for eviction. This is before the original authority. Likewise, before the appellate authority also, that such a payment has to be made. Sub-section (2) requires the deposit of rent to be made within the time and the manner prescribed. In the instant case, as I have already noted that the revision petitioner was called upon to pay the rent from 1st November, 1977 at the rate of Rs. 500 per month on or before 5th September, 1980 less the admitted arrears of Rs. 3,500 paid. Therefore, time had been specified and the manner of payment had also been prescribed. Since sub-section (3) is not necessary for the purpose, because the enquiry had been done, I move on to sub-section (4). That sub-section reads as under:—

> "11. (4) If any tenant fails to pay or to deposit the rent as aforesaid the Controller or the appellate authority, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building."

6. It is only by virtue of this power the order, dated 22nd September, 1980 came to be passed having regard to the above statutory provisions. One thing is apparent that if really the tenant was serious about his appeal, he should have deposited the arrears within the due date. It requires to be noted at this stage, even in the affidavit filed in support of M.P. No. 584 of 1980, all that is stated was as follows:—

> "I state that on 22nd August, 1980, this Honourable Court was pleased to pass an order in M.P. No. 404 of 1980, that the petitioner should pay the entire arrears of rent at the rate of Rs. 500 from 1st July, 1977 upto date less Rs. 3,500 on or before 5th September, 1980, failing which stop proceedings would be ordered. I have instructed our advocate to file an appeal as against the above order and the copy application, dated 22nd August, 1980 is registered as C.D. No. 11050. I state it will take at least two weeks time to obtain the certified copy of the order and file an appeal. I state that the time given for payment expires on 5th September, 1980 and it being conditional order it will work itself out if the order is not complied with and further

proceedings may be stopped as against the petition and eviction ordered."

Therefore, I take it, the filing of the appeal was the only ground that was raised and even in such a case, deposit was essential. That being the correct position, the mere averment in the very same affidavit that the revision petitioner was ready and willing to deposit the entire amount into Court less the admitted arrears already paid, would not in any way be helpful to the revision petitioner. He should have deposited the amount and then only could have avoided the eviction since the only ground that was stated was filing of the appeal. Therefore, on 5th September, 1980, the order, dated 22nd August, 1980, has come into being and has worked itself out. The eviction order stood unaltered in the latter circumstances. By this I mean, the latter deposit can never cure the original non-compliance. Therefore, the appeals themselves could not have been entertained unless and until the amount was deposited since sub-section (1) categorically lays down:

> "No tenant against whom an application for eviction was made by a landlord under section 10 shall be entitled to .... prefer any appeal under section 23 against any order made by the Controller on the application, unless he has paid or pays to the landlord, or deposits with the Controller or the appellate authority .... all arrears of rent due in respect of the building upto the date of payment or deposit, and continues to pay or deposit any rent which may subsequently become due...... until the termination of the proceedings ...."

Admittedly, at the time of preferring the appeal, the arrears had not been paid or deposited in terms of section 11 (1) of the Act. Hence the appeals themselves should not have been entertained, apart from the fact that the order passed on 22nd August, 1980, had worked out itself, by the appellate authority. When the appeals themselves were incompetent, now the question becomes academic whether there was justification for refusing to deposit the amount. This is because purely of the statutory provisions and one cannot import the general consideration of justice or equity in a case of this character. That is why I said that it makes bad law.

7. For all these reasons, these revision petitions will stand dismissed.

8. However, there will be no order as to costs.

9. A request was made by the learned Advocate-General that some time may be granted to vacate the premises. I have grave doubt as to whether when exercising revisional jurisdictions, time can be granted, as prayed for by the learned Advocate-General. However, Mr. Habibullah Basha, the learned counsel for the respondent is fair enough to state that his client is willing to grant time till 28th February, 1982. Recording this statement of Mr. Habibullah Basha, time is granted to the revision petitioner till 28th February, 1982 to deliver vacant possession.

R.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and R. Sengottuvelan, JJ.*

Tamil Nadu Wakf Board by its Secretary having its office at No. 4, Santhome High Road, Madras-4 .. *Appellant**

v.

Khader Badsha Saheb .. *Respondent.*

and

Tamil Nadu Wakf Board by its Secretary having its office at No. 4, Santhome High Road, Madras-4 .. *Appellant**

v.

Ponnuthayammal .. *Respondent.*

and

T. N. Wakf Board by its Secretary having its office at No. 4, Santhome High Road, Madras-4 .. *Appellant*

v.

Shaik Dawood and another .. *Respondents.*

Muslim Wakf Act (XXIX of 1954), *section* 15 (2) (h) — *Public Wakfs (Extension of Limitation) Act (XXIX of* 1959), *section* 3 —*Wakf properties—Suit to recover—Muthavalli executing usufructuary mortgage—Whether wakf dispossessed by executing usufructuary mortgage—Held in the negative—Public Wakfs (Extension of Limitation) Act* (1959), *section* 3—*Alienation of wakf properties by sale when saved from bar of limitation.*

The Tamil Nadu Wakf Board had filed a suit O.S. No. 519 of 1970 to recover the property belonging to a Pallivasal. The defendant claimed title by prescription and contended that the suit was barred. The defendant was the assignee of the usufructuary mortgage of the property belonging to the Pallivasal. The trial Court decreed the suit. The first appellate Court set aside the decree. The Second Appellate Judge held that the suit was barred by limitation. The Wakf Board filed a Letters Patent Appeal.

Held: When the muthavalli of a wakf executed a usufructuary mortgage in relation to the wakf properties, the wakf was not thereby dispossessed of the property and the possession of the usufructuary mortgagee should be taken to be a constructive possession of the wakf concerned. When possession was given voluntarily on behalf of the wakf to the mortgagee the wakf cannot be said to be dispossessed of its properties. It was only when the usufructuary mortgagee set up adverse title to the knowledge of the wakf, if it was possible to do so inspite of the doctrine of estoppel, it was only from that date, the wakf could be said to have been dispossessed. [*Para.* 11.]

It is only on the date of execution of the sale deed that the wakf is deprived of its properties as a result of the conduct of the muthavalli in parting away with the properties by way of sale. Since in the instant cases transfers by way of sales had taken place after 1947, section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, will stand attracted to these case. [*Para.* 11.]

Cases referred to:—

Machi Reddy v. *Wakf Board,* (1972) 2 An.W.R. 237: A. I. R. 1973 A. P. 73; *C. J. Mutt* v. *G. V. Purushotham,* (1973) 2 An.W.R. 302: A.I.R. 1974 A. P. 175; *Adinarayana Chetty* v. *T. T. K. K. Appan Srirangachariar,* A. I. R. 1941 Mad. 217; *Rajaram* v. *Ramanujam,* (1962) 1 M.L.J. 220: 74 L.W. 739: A.I.R. 1963 Mad. 213; *Aiyisa Bivi Ammal* v. *Kalandarsa Rowther,* (1925) 86 I.C. 433: A.I.R. 1925 Mad. 1020; *The Board of Muslim Wakfs* v. *Radhakrishnan,* (1979) 1 S.C.J. 325: (1979) 2 S.C.R. 148: (1979) 2 S.C.C. 468: A.I.R. 1979 S.C. 289.

Appeals under clause 15 of the Letters Patent against the judgment and decree of Mr. Justice Varadarajan, dated 12th January, 1976 and passed in S.A. Nos. 626 of 1973, 19 of 1973, 1534 of 1973, 1661 of 1973, 1662 of 1973, respectively against A.S. Nos. 181 of 1971, 182 of 1971, and 183 of 1971 respectively on the file of the Court of the Subordinate Judge, Sivaganga (O.S. Nos. 513 of 1970, 514 of 1970 and 519 of 1970 respectively) on the file of the Court of the District Munsif, Sivaganga).

*L.P.A. Nos. 126 of 1976 and 55 to 59 of 1977.

21*st January,* 1981.

D. Peter Francis, for Appellants.

S. T. Samiullah and *S. M. Hameed Mohideen*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—As all these Letters Patent Appeals arise out of a common judgments rendered by the trial Court, Appellate Court and the Second Appellate Court, they are to be disposed of by a common judgment.

2. The Letters Patent Appeals Nos. 126 of 1976, 57 of 1977 and 58 of 1977, arise out of the same suit O.S. No. 513 of 1970, which is one for recovery of possession of 1 acre and 11 cents comprised in Survey No. 204|1, filed by the Tamil Nadu Wakf Board against one Ponnuthayammal. Letters Patent Appeal No. 55 of 1977, arises out of the suit O.S. No. 514 of 1970, filed by the Wakf Board against one Khader Batcha Saheb for recovery of possession of 1 acre and 89 cents comprised in Survey No. 188|1. Letters Patent Appeals Nos. 56 and 59 of 1977 arise out of the suit O.S. No. 519 of 1970 filed by the Wakf Board against one Sheik Dawood Saheb and two others for recovery of possession of about 2.03 acres comprised in Survey No. 176|2 in Madapuram Village in Sivaganga Taluk. In all the three suits the Wakf Board pleaded as follows:—

3. The Assistant Commissioner of Wakfs appointed under section 4 of the Muslim Wakfs Act (hereinafter referred to as the Act), made an enquiry under the said section and filed a report, Exhibit A-1, dated 31st July, 1956, to the effect that the suit properties belonged to Agori Pallivasal. Thereupon, a publication was made in the Official Gazette, Exhibit A-2 on 22nd April, 1959. But no suit had been filed by any one questioning the notification within one year from the date of publication of Exhibit A-2. Therefore the Wakf Board is entitled to file the suits under section 15 (2) (*h*) of the Act, which enables the Board to recover the lost properties of any wakf along with mense profits both past and future.

4. The defendant in O.S. No. 513 of 1970 had purchased the properties involved in the suit from one Pacha Saheb and two others under Exhibit B-1, dated 13th March, 1952 and from Khader Batcha Saheb under Exhibit B-2, dated 15th March, 1953. The defendant in O.S. No. 514 of 1970 had purchased the properties involved in that suit from one Kottuthurai Sahib under Exhibit B-9, dated 9th December, 1953, and, from one Raj Mohamed Sahib under Exhibit B-10, dated 17th December, 1953, from one Habib Sahib under Exhibit B-11, dated 7th October, 1954 and from one Mohideen Badsha Saheb under Exhibit B-12, dated 23rd December, 1957, respectively. The defendant in O.S. No. 519 of 1970 is the assignee of the usufructuary mortgage in respect of the property involved in that suit under Exhibit B-28, dated 9th August, 1948 and the assignment under Exhibit B-27, dated 13th September, 1944, had been executed by one Thaiyar Sultan Saheb and others, and in these documents there is reference to the Pallivasal being the owner of the property covered thereby.

5. The common defence taken by all the defendants in all the three suits was that the properties were not wakf properties, that none connected with Agori Pallivasal exercised any ownership with reference to those properties at any time, that the notification published in the Gazette under Exhibit A-2 was not binding on them and that, in any event, they have acquired title to the suit properties by prescription. They also took out the plea that the suits are barred by limitation and, therefore, the suits filed for recovery of possession are, in any event, barred by limitation.

6. The trial Court found on a consideration of the materials on record that the suit properties were wakf properties belonging to Agori Pallivasal, that the alienations in favour of the defendants were void, that the possession of the predecessors in title of the defendants was as muthawallis that therefore the defendants had not acquired title to the properties by adverse possession and that in any event the suits were in time in view of section 3 of the Public Wakfs (Extension of Limitation) Act, 1959. On these findings, the trial Court decreed all the three suits as prayed for.

7. On appeal, the first Appellate Court sustained the decree passed by the trial Court in O.S. No. 514 of 1970 but set aside the decree passed by the trial Court in O.S. Nos. 513 of 1970 and 519 of 1970. Both the Wakf Board as well as the defendants in the three suits filed second appeals so far as the

decision of the lower Appellate Court was against them.

8. The Second Appellate Court (Varadarajan, J. as he then was), held that though the notification under Exhibit A-2 was not binding on the defendants as they had no notice of the enquiry by the Assistant Commissioner of Wakf under section 4 of the Act and as such the defendants are not bound to file a suit challenging the notification within one year therefrom, the Wakf Board has established in those suits that the suit properties belong to Agori Pallivasal, that the Inam Fair Register extracts, Exhibits A-3 to A-5, and the Inam B-Register extracts Exhibits A-12 and A-13 and Exhibits A-14, dated 1st October, 1967 and A-15, dated 1st May, 1967, granting pattas in favour of the Agori Pallivasai clearly showed that the suit properties belong to the Agori Pallivasal and therefore, the finding of the Courts below that the Agori Pallivasal has got title to the suit properties cannot be interfered, with.

9. On the question of limitation, the Wakf Board at the stage of the Second Appeal had raised a new plea that Article 96 of the Limitation Act, 1963 will enable the Wakf Board to file the suit within 12 years from the date of constitution of the Wakf Board which was in the year 1958 and, therefore, the said suits filed by the wakf for recovery of possession of the property should be taken to be in time. They had already taken the plea in the plaint that the suits are saved from the bar of limitation by section 3 of the Public Wakfs (Extension of Limitation) Act, 1959. The Second Appellate Judge held that Article 96 of the Limitation Act, cannot be invoked on the facts and circumstances of this case, and that the benefit of section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, also cannot be claimed for two suits. In that view, the Second Appellate Judge held that the suits O.S. Nos. 514 and 519 of 1970 were barred by limitation. In O.S. No. 513 of 1970 the learned Second Appellate Judges found that 41 cents out of 1 acre and 11 cents comprised in that suit had been alienated in 1947 and therefore, the Public Wakfs (Extension of Limitation) Act, 1959, will apply to that extent and, therefore, the said suit was decreed to the extent of 41 cents and dismissed in other respects. Aggrieved against the said judgment of the Second Appellate Judge, both the plaintiff and the defendants have filed before this Court the above Letters Patent Appeals.

10. Before us, the learned counsel for the Wakf Board contends that the Second Appellate Judge is in error in holding that Article 96 of the Limitation Act, will not apply. It is pointed out by the learned counsel that since the alienations in these cases have been made either by the original muthavallis or their legal representatives, the properties could be recovered by the Wakf Board which is the authority constituted under the statute, and the suits having been filed within 12 years from the date af constitution of the Wakf Board, they are to be held as not being barred by limitation. Reliance is placed in support of the said legal plea on the decision in *Machi Reddy* v. *Wakf Board*[1], and the decisions of Natarajan, J., in *Sornathammal and others* v. *Tamil Nadu State Wakf Board*[2] and *Thangiah Velar* v. *Tamil Nadu State Wakf Board and another*[3] and another judgment of the Andhra Pradesh High Court in *C. J. Mutt, Tirupathi* v. *G. V. Purushotham*[4], and the Division Bench decision in *Tamil Nadu Wakr Board* v. *Kaveriammal and others*[5]. In the decisions referred to above and relied by the appellant it has been specifically found that the alienation was by the previous trustee and therefore it is for that specific reason. Article 96 of the Limitation Act, 1963, has been applied. It is however seen that in this case there is no concrete and acceptable evidence that the alienations, on the basis of which the defendants claim title to their respective properties, were by the previous muthavallis and that the vendors under the documents on the basis of which the defendants claim title and possession to the properties were in fact the trustees or muthavallis of Agori Pallivasal. Unless that fact is established it cannot be said that the defendants are holding the proper-

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1. (1972) 2 An.W.R. 237: A. I. R. 1973 A.P. 73.
2. S.A. No. 400 of 1972.
3. S.A. No. 456 of 1972.
4. (1973) 2 An.W.R. 302: A. I. R. 1974 A.P. 175.
5. A.S. No. 382 of 1973.

ties on the basis of the alienation made by the previous trustees or muthavallis of the Agori Pallivasal. Though the second appellate Court referred to the evidence of P.W. 2 which is to the effect that the original alienation had been made by the legal representatives of the original muthavallis, it has proceeded on the basis that the said evidence is not either sufficient or conclusive. Even if it is shown that the original alienation of the wakf property was by muthavallis, since the subsequent alienations could not have been made by persons who are muthavallis, it is not possible to apply section 96 of the Limitation Act, which provides for a suit by the succeeding trustee for the recovery of the property alienated by the previous trustee. Apart from the so-called admission of D.W. 2 referred to by the trial Court in support of its finding that the alienations were by muthavallis or their legal representatives the plaintiff has not adduced any concrete and sufficient evidence for invoking Article 96 of the Limitation Act, which can be applied only in cases where the suit is filed by the succeeding trustee to recover the property unauthorisedly alienated by the previous trustee or muthavalli. Apart from referring to the documents on the basis of which the defendants claim title, no attempt has been made by the plaintiff to prove as to who were the original muthavallis in respect of the suit property, and low the properties came to be ultimately in the hands of the defendants. Unless, the alienors under whom the defendants claim are shown to be either muthavallis or their legal representatives, section 96 of the Act cannot, in our opinion, be invoked to get over the bar of limitation which will be otherwise applicable in cases where the defendants have been in adverse possession of well over the statutory period of 12 years. Though the Second Appellate Judge has referred to the decisions cited above and stated that he is not agreeing with the said view, the learned Judge has not referred to the distinction between the facts in those cases and facts of the present case. However, the learned Judge in our view has come to the correct conclusion in holding that section 96 cannot be invoked on the facts of this case.

11. Dealing with the scope of section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, the Second Appellate Judge has taken the view that since the dispossession of the suit items of properties excepting 41 cents in Survey No. 204|1 took place before 1947, section 3 of that Act cannot come into play. That finding of the Second Appellate Judge has been challenged by the Wakf Board. According to the Wakf Board, the dispossession can take place only in the case of absolute alienation such as sale and that in the case of usufructuary mortgage there is no question of any dispossession. In respect of the properties covered by the suit O.S. No. 513 of 1970 the first alienation was under Exhibit B-1, dated 13th March, 1952; in respect of the properties covered by O.S. No. 514 of 1970 the first alienation was under Exhibit B-9, dated 9th December, 1953; and in the case of the properties covered by O.S. No. 519 of 1970 there has been no sales, but only usufructuary mortgages from 1918 to 1958. Having regard to the fact that there has been no absolute alienation by way of conveyance before 14th August, 1947, the Public Wakfs (Extension of Limitation) Act, 1959, has to be applied, as the dispossession can be said to have taken place only after the relevant date, *i.e.*, 14th August, 1947. As against this, learned counsel for the defendants contends that the dispossession in this case should be deemed to have taken place when the usufructuary mortgages had been executed under which possession of the wakf has passed on to the mortgagee and as the mortgages had been admittedly executed before the relevant date, *i.e.*, 14th August, 1947, section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, cannot come

into play at all. It is pointed out by the learned counsel for the defendants that in O.S. No. 513 of 1970, the first othi was under Exhibit B-7, dated 10th September, 1891, that in respect of the property covered in O.S. No. 514 of 1970 the first othi was under Exhibit B-15, dated 13th July, 1894 and that in respect of the property covered by O.S. No. 519 of 1970 the first othi was under Exhibit N-30, dated 1st October, 1918. There cannot be any dispute that if the date of the usufructuary mortgage is taken as the date of dispossession, section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, cannot apply. But if the date of usufructuary mortgage is not taken as the date of dispossession and if the dispossession is deemed to have taken place only under the sale deeds, then the sales having been executed subsequent to 14th August, 1947, section 3 of the Public Wakf (Extension of Limitation) Act, 1959, will come into play. Thus, the main question to be considered in this context is whether the execution of the usufructuary mortgage by the muthavallis can be taken to be the date of dispossession of the wakf. The learned counsel for the defendants has relied on the following decisions, namely, *Adinarayana Chetty* v. *T. T. K. K. Appan Srirangachariar and others*[1]; *Rajaram* v. *Ramanujam and others*[2]; *Aiyisa Bivi Ammal* v. *Kalandarsa Rowther*[3] and *The Board of Muslim Wakfs, Rajasthan* v. *Radhakrishnan and others*[4], in support of his plea that even in cases where the properties transferred under the usufructuary mortgage by a trustee or muthavalli, the limitation will run from the date of the mortgage, if the usufructuary mortgage is found to be void and, therefore, the mortgagee under such an invalid transfer will acquire title by adverse possession. However, we find that the above decisions deal with the question as to when alienees' title become adverse. But the question which we have to consider here is as to when there was dispossession. For deciding that question, the above decisions do not appear to be quite relevant. When the muthavalli of a wakf executes a usufructuary mortgage in relation to the wakf properties, the wakf is not dispossessed of the property and the possession of the usufructuary mortgagee should be taken to be a constructive possession of the wakf concerned. When possession is given voluntarily on behalf of the wakf to the mortgagee the wakf cannot be said to be dispossessed of its properties. It is only when the usfructuary mortgagee sets up adverse title to the knowledge of the wakf, if it is possible to do so inspite of the doctrine of estoppel, it is only from that date the wakf can be said to have been dispossessed. If the creation of an usufructuary mortgage by the wakif on behalf of the Agori Pallivasal is taken to be dispossession of the wakf, even a lessee of the wakf can say that he has dispossessed the wakf. That will lead to anomalous situation. Therefore, we are not inclined to accept the contention of the learned counsel for the defendants that by creating usufructuary mortgage in respect of wakf property, the wakf has been dispossessed of the property transferred by way of usufructuary mortgage. We are not therefore prepared to accept the contention of the learned counsel for the defendants that the dispossession in this case should be taken to have taken place on the date of the creation of the first usufructuary mortgage. In our view, the correct view to be taken is, it is only on the date of the execution of a sale deed, the wakf is deprived of the properties as a result of the conduct of the muthavalli in parting away the properties by way of sale. Admittedly, in these cases, the transfers by way of

1. A.I.R. 1941 Mad. 217.
2. (1962) 1 M.L.J. 220: 74 L.W. 739: A.I.R. 1963 Mad. 213.
3. (1925) 86 I.C. 433: A. I. R. 1925 Mad. 1020.
4. (1979) 1 S.C.J. 325: (1979) 2 S.C.R. 148: (1979) 2 S.C.C. 468: A.I.R. 1979 1979 S.C. 289.

sales have taken place after 1947. Therefore, section 3 of the Public Wakfs (Extension of Limitation) Act, 1959, will stand attracted in these cases. The two suits, O.S. Nos. 513 and 514 of 1970, where the wakf properties have been alienated by way of sale, should be taken to have been saved from the bar of limitation by section 3 of the Public Wakfs (Extension of Limitation) Act, 1959. In O.S. No. 519 of 1970 there has been no alienation by way of sale and, therefore, there is no room for the application of section 3, as we have already held that mere execution of usufructuary mortgages by a muthavalli will not amount to dispossession of the wakf. However, it has been found by the first appellate Court that the defendants in that suit are the legal representatives of the original muthavallis themselves and that they are not strangers to whom the wakf property had been transferred. In such cases, section 10 of the Limitation Act, will straightaway apply as no trustee can set up adverse title to the trust by his possession of the wakf properties for any length of time. Though the said finding of the lower appellate Court has not been referred to by the Second Appellate Judge, in so far as the Second Appellate Judge has not set aside that finding of the lower appellate Court, we cannot ignore that finding. The finding of the lower appellate Court is as folllows:

> "So far as the suit in O.S. No. 519 of 1970 is concerned, defendants 1 and 2 therein are the descendants of the original nusafirs or mutawallis of the Pallivasal. Although they claim the property as ancestral their possession is only in their capacity as the descendants of the original musafirs. They cannot acquire title by prescription inasmuch as their possession is only in fiduciary capacity".

Since this finding of the lower appellate Court has been overlooked by the Second Appellate Judge and the suit has been held to be barred by limitation, we have to set aside the dismissal of the suit (O.S. No. 519 of 1970) and decree the same on the ground that the said suit is not barred by limitation and the property covered by that suit has been proved to be wakf property.

12. In the view expressed above, we have to hold that the L.P.A. Nos. 55 of 1977, 56 of 1977, 57 of 1977, 58 of 1977 and 59 of 1977 will stand allowed and the L.P.A. No. 126 of 1976 filed by the defendant will stand dismissed. There will however be no order as to costs.

S.J. —— *L.P.A. Nos. 55 to 59 of 1977 allowed.*
L.P.A. No. 126 of 1976, dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

Govindan S/o. Vaguthan @ Rasa Goundar .. *Petitioner**

v.

Govindan S/o. Pallan @ Latchuman .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rules 37 and 38—The Tamil Nadu Debt Relief Act (Presidents' Act XXXI of 1976), section 1—Execution petition for arrest and detention—Judgment-debtor claiming benefits under Act XXXI of 1976—Income from mango grove, whether income from agriculture—Income held to be income from agricultural land.

The judgment-debtor in an execution petition claimed the benefits of Act XXXI of 1976 on the ground that he owned one unit of land and had income from a mango grove. The executing Court negatived the claim of the judgment-debtor on the ground that the income from the mango grove was not income derived from agricultural land. On revision by the judgment-debtor, Held: "Agriculture" has been defined to include horticulture and the raising of plantation crops, and "plantation crops" is defined to mean cardamom, cinchona, coffee, rubber or tea. It is therefore obvious that the term "agriculture" is used in the widest connotation and it is so comprehensive as to take within its ambit the raising of plantation crops like cardamom cinchona etc.

Raising of a mango grove certainly fell within the purview of horticulture and the

*C.R.P. No. 1221 of 1980. 18*th September*, 1981.

income derived from the mango grove was nothing but income derived, from agricultural land. As 'agriculture' included horticulture, and as raising of mango grove was horticulture, the income derived therefrom was only income from agricultural land. [*Para*. 3.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Krishnagiri, dated 13th March, 1980 and made in R.E.P. No. 363 of 1979 in O.S. No. 106 of 1978.

V. Sridevan, G. Masilamani and *J. Jagannathan*, for Petitioner.

V. Natarajan and *V. Nicholas*, for Respondent.

The Court delivered the following

JUDGMENT :—The judgment-debtor has filed this civil revision petition and the decree-holder is the respondent. The decree-holder filed an execution petition under Order 21, rules 37, 38, Civil Procedure Code, for arresting and detaining the petitioner herein for realising the decree amount. The petitioner pleaded that he is a small farmer entitled to the benefits of Act XXXI of 1976. The Executing Court negatived the claim holding that though the petitioner does not own more than one unit of land, he is still not entitled to the benefits of Act XXXI of 1976 as his principal means of livelihood was from income derived from a mango grove, which cannot be construed as "agricultural land". The Civil revision petition is directed against that order of the Executing Court.

2. The learned counsel for the petitioner contended that "agriculture" includes horticulture and income derived from mango grove is also income derived from agricultural land and in view of the specific finding of the executing Court that the petitioner does not own more than one unit of land, the petitioner is entitled to the benefits of Act XXXI of 1976.

3. Section 4 (*c*) of Act XXXI of 1976 provides that all suits and other proceedings (including appeals, revisions attachments or execution proceedings) pending at the commencement of this Act against any debtor for the recovery of any such debt (including interest, if any) shall abate." "Debtor" is defined to include (1) a landless agricultural labourer or (2) a rural artisan; or (3) a small farmer. "Small farmer" has been defined to mean "a person whose principal means of livelihood is income derived from agricultural land and who holds, whether as owner, tenant, or mortgagee with possession or partly in one capacity and partly in another

(*i*) not more than two units of land, in a case where such person is a member of any of the Schedule Tribes; and—

(*ii*) not more than one unit of land, in any other case.

" Agriculture " is defind to include (1) horticulture (2) the raising of crops (including plantation crops grass or garden produce; (3) dairy farming; (4) poultry farming ; (5) breeding of livestock; (6) grazing". In the instant case there is a clear finding by the Executing Court that the petitioner does not own more than one unit of land. The only other question that survives for consideration is whether his principal means of livelihood is income derived from agricultural land. The finding of the Executing Court is that the petitioner owns a mango grove having 27 trees and the income derived therefrom is not less than Rs. 2,400. "Agriculture" has been defined to include horticulture and the raising of plantation crops. The Act defines plantation crops to mean cardamom, cinchona, coffee, rubber or tea. It is therefore, obvious that the term "agriculture" has been used in its widest connotation and it is so comprehensive as to take within its ambit raising of plantation crops like cardamom, coffee, rubber or tea. Raising of a mango grove certainly falls within the purview of horticulture and the income derived from the mango grove is nothing but income derived from agricultural land. As "agriculture" includes horticulture, and as raising of mango grove is horticulture, the income derived therefromis only income from agricultural land. The petitioner is, therefore, entitled to the benefits of Act XXXI of 1976 and the execution proceeding taken against the petitioner stand abated under section 4 (*c*) of the Act.

4. In the result, the civil revision petition is allowed. Parties to bear their own costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and S. Swamikkannu, JJ.*

B. Soundarapandian and another ... *Appellants**

v.

Industrial Finance Corporation of India and others ... *Respondents.*

(A) *Industrial Finance Corporation Act (XV of 1948), section 30—Letters Patent (Madras), clause 15—Properties mortgaged to Industrial Finance Corporation of India —Proceedings for realisation of dues in the nature of proceedings in execution of decrees—Order fixing the remuneration of receivers, held appealable —Appeal maintainable under clause 15 of Letters Patent.*

(B) *Madras High Court Original Side Rules, Order 34, rule 7—Proceedings under section 30 of the Industrial Finance Corporation Act— Order 34, rule 7 of the Original Side Rules applicable—Fixing of remuneration of receivers—Discretion vested in the Judge.*

There can be no doubt that proceedings for sale of the security or mortgaged property for realisation of the dues under section 30 of the Industrial Finance Corporation Act are in the nature of proceedings in execution of decrees. The appointment of a Receiver is one of the modes by which the mortgaged property is secured for the purpose of sale in order to realise the loan or advance. Since there is no restriction as to the mode or manner of execution for sale of the property mortgaged, all the powers available to the Court under the Code of Civil Procedure and the Original Side Rules are applicable and available while dealing with an application under section 30. Therefore, though the appointment of a Receiver or exercise of the power incidental thereto is not one of the orders mentioned in sub-section (11) of section 30 such an order would still be an appealable one if that is otherwise appealable under the provisions of the Code of Civil Procedure or any other provision of law for the time being in force. There is nothing in section 30 which bars the filing of an appeal against the order fixing the remuneration of a Receiver if that order is otherwise appealable under any other provision of law. [*Para.* 4.]

Here the dispute is between the parties and the Joint Receivers as to the amount of remuneration to be fixed. That is an independent proceeding in which the rights of the Receivers are determined. Accordingly it could be said that the order in question had decided an issue between the parties and so far as the Receivers and the parties to such dispute are concerned, there is a termination of the proceeding. The decision now under appeal is a judgment within the meaning of clause 15 of the Letters Patent and this appeal is maintainable. [*Paras.* 5 *and* 6.].

The applicability of Order 34, rule 7 of the High Court Original Side Rules to proceedings under section 30 of the Industrial Finance Corporation Act, 1948 cannot be excluded. [*Para.* 7.]

It may be seen from rule 7 of Order 34 of the Original Side Rules, 1956 that normally five per cent on the value realised by him could be claimed by the Receiver as commission, but that is subject to the condition referred to in that rule itself, namely, 'unless the Judge otherwise directs'. Though the discretion vested in the Court in this regard may be considered to be a judicial discretion, still that a discretion is vested in the Judge to grant less or more than five per cent. cannot be disputed. It cannot be said that this discretion vested in the Judge could only be exercised for the purpose of variation of the percentage and should not be considered as giving a power to fix the remuneration at a fixed figure or on a monthly salary basis. [*Para.* 8]

Once the remuneration is not fixed at the time of the appointment of the receiver, the power is always vested in the Court to fix the remuneration either at a percentage of the collections or at a fixed amount or at a fixed monthly remuneration according to the circumstances of each case. Of course, the Judge would be guided by the quantum of work and the other circumstances in each

*O. S. A. No. 74 of 1981. 16th July, 1981.

case. In all such matters, therefore, the Court must fix the remuneration with reference to the period for which the receivers worked and the quantum of work turned out by them. [*Para*. 9.]

Normally when authorised auctioneers are asked to sell the proprety the practice of the High Court is to give 2½ per cent. of the total amount realised upto Rs. 50,000 and at 1½ per cent for the balance. Order 38, rule 5 provides that the Court may under special circumstances upon application by party or *suo motu* appoint an advocate or other person as Commissioner to sell the property and may fix as his remuneration a sum certain or a percentage on the net sale proceeds not exceeding the scale fixed in items 28 and 29 of Appendix II of the High Court-fees Rules. [*Para*. 12.]

Cases referred to:—

Gujarat State Financial Corporation v. *Natson Manufacturing Co*., (1978) 4 S.C.C. 32: (1978) S.C.C.(Crl.) 482: A.I.R. 1978 S.C. 1745; *Palaniappa* v. *Krishnamurthi*, (1967) 2 M.L.J. 1: I.L.R. (1967) 3 Mad. 227: 80 L.W. 309: A I.R. 1968 Mad 1; *Ali Ismail* v. *Momin Bibi*, A.I.R. 1952 Cal. 52; *Kabalamurthi Pillai* v. *Subramanian Pillai*, (1931) 60 M.L.J. 332: A.I.R 1931 Mad. 500.

Appeal under clause 15 of the Letters Patent and Order 36, rule 11, Original Side Rules against the order of Sathiadev, J., dated 7th April, 1981 in Memo. 7 of 1981 in O. P. No. 200 of 1977.

O. V. Baluswami, for Appellants.

R. David, for *King* and *Patridge*, *A. L. Somayajee*, for *Aiyar* and *Dolia* and *R. Muthukumaraswami*, for Respondent.

The Order of the Court was made by

Ramaswami, J.— This is an appeal preferred by the Joint Receivers of Micro Tools Ltd. The Industrial Finance Corporation of India, the first respondent herein filed O.P. No. 200 of 1977 on the file of this Court under section 30 of the Industrial Finance Corporation Act praying for sale of the properties M/s. Micro Tools Ltd., described in the mortgage deed, dated 2nd May, 1967, and the deed of further charge created thereunder and for the appointment of a Receiver in respect of the said properties. They have also prayed for a direction to the Receiver to take possession of the properties forthwith. By an order, dated 27th July, 1977. This Court appointed two advocates, Messrs. G. Gopalaswami and A. Sivaji, as Joint Receivers and directed them to take possession of the factory. Pursuant to this order, the Joint Receivers took possession of the factory, made a detailed inventory of the machineries and other articles and filed a first report. Thereafter the Joint Receivers were visiting the factory and taking such other action as is necessary to keep the machinery and other articles intact including supervision of the watch and ward staff. Various other proceedings also appear to have been taken in order to maintain the discipline of the watch and ward staff and make available the security for the satisfaction of the mortgage debt due to the first respondent. At the time when the two Joint Receivers were appointed, this Court ordered an initial remuneration of Rs. 2,000 which was divided by the two receivers equally. One of the Joint Receivers, Mr. G. Gopalaswami was relieved from receivership at his own request by an order dated 21st November, 1979 and at that time he was paid an additional remuneration Rs. 1,000. By the same order, this Court appointed Mr. B. Soundarapandian, an advocate of this Court as a Joint Receiver in the place of Mr. G. Gopalaswami, This Court also directed the new Joint Receivers to call for tenders for purchase of the factory by publishing advertisements in the newspapers widely. The Joint Receivers accordingly called for tenders, making wide publication throughout the country. Among the offers received, the highest was one for Rs. 38,00,000. On the suggestion made by the first respondent herein, the Industrial Credit and Investment Corporation of India Ltd, the third respondent herein and the Tamil Nadu Industrial Investment Corporation Ltd, the fourth respondent herein who are also creditors having certain claims over Micro Tools Ltd. this Court directed the Joint Receivers to appoint Government approved valuers for valuing the properties. These valuers valued the land and building at Rs. 34,00,000, and machiner etc at Rs. 68,31,475. Since the offer of Rs. 38,00,000, was nowhere near aforesaid estimation, this Court directed the Joint Receivers to invite fresh offers. One Messrs. Bijay Tractors Spares, Calcutta made an offer for Rs. 51,51,551, and this offer was accepted by this Court by an order dated

23rd April, 1980. Though the party had deposited a sum of Rs. 1,00,000, as an initial deposit, he had defaulted to furnish Bank guarantee and pay the balance of sale consideration within the time give by this Court and therefore, the sale in favour of the said party was set aside and the sum of Rs. 1,00,000 deposited by the said party was forfeited. On further directions given by this Court, the Joint Receivers again published inviting offers and the highest offer made this time was Rs. 50,76,001 and that was accepted by this Court The purchasers deposited the entire sum of Rs. 50,76,001 and the sale was confirmed in their favour on 3rd February, 1981. While submitting their accounts, the Joint Receivers filed a memo praying to fix their remuneration at 5 per cent of 'the sale consideration realised out of the sale Micro Tools factory.' It may be mentioned that the Joint Receivers were paid then and there whatever out-of pocket expenses they made in respect of the administration of the factory or the sale by publication and also their legal expenses and the amount claimed in this case referred to only remuneration. When this matter came up for orders. By an order. dated 20th February, 1981 the learned Judge (Sathiadev,J,) directed the parties to file their statements or objections in writing. The first respondent filed their objections in which they have stated that taking into consideration the period for which the Joint Receivers were made to administer the properties and the actual work that they were called upon to do such Joint Receivers, a remuneration at the rate Rs. 500 per month to each of the Receivers would be reasonable and the claim of 5 per cent on the sale consideration was exorbitant, if not too high. After hearing the parties, by an order, dated 7th April, 1981, the learned Judge fixed the remuneration at the rate of Rs. 500 per month and since each of the Receivers was working for different periods, the remuneration payable was fixed with reference to the period for which they worked. Accordingly, Sri Soundarapandian's remuneration was fixed at Rs. 9,000, at the rate of Rs. 500 per month for 18 months worked by him and that of Mr. Sivaji was fixed at Rs. 23,000, again on the basis of Rs. 500 per month for a period of 46 months worked by him. It is against this order, the Joint Receivers have filed this appeal.

Two main grounds were raised in the grounds of appeal in this case. The first ground was that the remuneration will have to be fixed as a percentage of the collections made by the receivers and not on fixed remuneration or salary basis. The second ground was that the remuneration of Rs. 500 per month fixed by the learned Judge was unrelated to the quantum of work done by the receivers and it was merely fixed on an acceptance of the suggestion or the first respondent. Mr. Somayajee. The learned counsel for the third respondent raised two preliminary objections, one relating to the maintainability of the appeal and the other relating to the applicability of the Original Side Rules as such. Therefore, those objections can be disposed of before we go into the merits of the appeal itself. According to the learned counsel, the petition for sale of the mortgaged properties was filed by the first respondent under section 30 of the Industrial Finance Corporation Act, 1948 (XV of 1948), and under that provision, the proceedings for sale initiated by the respondents were in the nature of execution proceedings and even such proceedings are governed by the various sub-sections in section 30. Then he referred to the various provisions in section 30 and contended that an order of the nature fixing the remuneration is not an appealable order, Micro Tools Ltd. had borrowed a large sum of money on mortgage of the factory and building from the first respondent Corporation and defaulted in repayment of the loan. Under section 30 of the Industrial Finance Corporation Act, where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any instalment thereof, the Corporation without prejudice to their right of sale either under section 28 of the Industrial Finance Corporation Act or under section 69 of the Transfer of Property Act, may apply to Court for any one of the following reliefs, *viz.*, (*a*) for any order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Corporation as security for the loan or advance; (*b*) for transferring the management of the industrial concern to the Corporation; or (*c*) for an *ad interim* injunction where there is apprehension of the machinery or the equipment being removed from the premises of the industrial concern without the permission of the Board. In this case, the application has been made for an order for sale of the mortgaged properties. Under sub-section (3) of section 30 where the application is for the reliefs men-

tioned in sub-clause (*a*) and (*c*) of sub-section (1), the Court shall pass an *ad interim* order attaching the security with or without an *ad interim* injunction restraining the industrial concern from trsnsferring or removing its machi ery or equipment. Under sub-section (14) the Court is also competent to appoint a receiver and to exercise all other powers incidental thereto. Sub-section (6) further directed that a not'ce shall be issued to the industrial concern as to why the *ad interim* ord r should not be made absolute or the injunction confirmed. If no cause is shown, under sub-section (7), the Court shall forthwith make the *ad interim* order absolute and direct the sale of the attached properties. Such an order would be appealable under sub-section (11) of section 30. If cause is shown, the Court shall, under sub-section (8), proceed to investigate the claim of the Corporation and the provisions of Code of Civil Procedure, 1908, shall, as far as practicable, apply to such proceedings. After such investigation is made, the Court shall pass an order confirming the order of attachment or direct the sale of the attached property or such other order as is referred to in sub-section (9) thereof. An appeal against this order is also provided under sub-section (11). The learned counsel for the third respondent contended that though an order making the *ad interim* attachment absolute and directing the sale of the attached property under sub-section (7), is made appealable, an order appointing a Receiver or exercising any of the powers incidental to such appointment of a Receiver is not made appealable under sub-section (11) and that, therefore, an order by which the remuneration was fixed is also not appealable

4. There can be no doubt that proceedings for sale of the security or mortgaged property for realisation of the dues under section 30 of the Industrial Finance Corporation Act are in the nature of proceedings in execution of decrees. In fact, considering similar provisions in the State Financial Corporation Act, 1951, which is *in pari materia* the Supreme Court in *Gujarat State Financial Corporation* v. *Natson Manufacturing Co*,[1] held that the substantive relief in an application of this nature is something akin to an application for attachment of property in execution of a decree at a stage posterior to the passing of the decree. Such a procedure is also not unknown as in French jurisprudence which we are applying in respect of Pondicherry matters, the mortgagee, was permited to execute the mortgage as if it were a decree by itself. But even so, we are unable to agree with the learned counsel that an order appointing a Receiver or an order made by the Court in exercise of the powers inciden al to such appointment of a Receiver is an order which is not appealable. It is true that sub-section (11) of section 30 specifically refers to sub.section (7) and sub-section (9). As already stated, sub-section (7) relates to making an order of *ad interim* attachment absolute and directing a sale and an order under sub-section (9) relates to a similar order but made after an investigation into the claim of the Corporation and they do not relate to he appointment of a Receiver or any of the powers exercised in relation to such power of appointment of a Receiver. But, we may mention that the Court to which the application should be made under section 30 of the Industrial Finance Corporation Act is the High Court within the local limits of whose jurisdiction the defendants or respondents carried on the whole or substantial part of their business. The appointment of a Receiver is one of the modes by which the mortgaged property is secured for the purpose of sale in order to realise the loan or advance. Since there is no restriction as to the mode or manner of executionfor sale of the property mortgaged, all the powers available to the Court under the Code of Civil Procedure and the Original Side Rules are, in our view, applicable and available while dealing with an application under section 30. Therefore, though the appointment of a Receiver or exercise of the power incidental thereto is not one of the orders mentioned in sub-section (11), such an order would still be an appealable one if that is otherwise appealable under the provisions of the Code of Civil Procedure or any other provision of law for the time being in force. In fact, we may also point out that sub-section (14) was not originally found when section 30 of the Industrial Finance Corporation Act was enacted and it came in only by way of amendment by Act LXXIV of 1972 and, therefore, neither sub-section (11) should control sub-section (14) nor could the appealability of the order under sub-section (14) be interpreted and

1. (1978) 4 S.C.C. 32: (1978) S.C.C. (Crl.) 482: A.I.R. 1978 S.C. 1745.

understood with reference to the provisions in sub-section (11) We are therefore, of the view that there is nothing in section 30 which bars the filing of an appeal against the order fixing the remuneration of a receiver if that order is otherwise appealable under any other provision of law.

5. It was then contended by the learned counsel for the third respondent, that in any case the order now sought to be appealed cannot be considered to be a judgment within the meaning of clause 15 of the Letters Patent and that, therefore no appeal lies. This point is not *res-integra* and is covered by authorities and the weight of authorities are against the contention of the learned counsel. A Full Bench of this Court considered the scope of clause 15 of the Letters Patent in the decision reported in *Palaniappa* v. *Krishnamurthi*[1]. The point for consideration was whether an order granting leave to sue *in forma pauperis* by a single Judge of a High Court is a judgment within the meaning of clause 15 of the Letters Patent. There was a conflict of opinion, some cases taking the view that the order by a single Judge excusing the delay in filing a pauper appeal is not a judgment which can be the subject matter of an appeal on the ground that it does not put an end to the proceeding and some other cases holding that an order dismissing an application for permission to file a suit *in forma pauperis* is a judgment on the ground that it puts an end to the litigation The matter was considered by the Full Bench in detail and the Full Bench proposed four tests for the purpose of determining the question and held that any one of them if satisfied will be sufficient to decide whether the particular order is a judgment within the meaning of clause 15 Letters Patent. The following are the tests propounded—

1. Whether the judgment or order of the single Judge terminated the suit or proceeding;

2. Whether it affects the merits of the controversy between the parties to the suit itself;

3. Whether it determines some right or liability as between the two parties; and

4. Whether apart from the actual order in the lis or proceeding 'a conceivable order' or an order to the contrary effect would have disposed of the suit.

If we apply these tests certainly the order in question will be appealable, though the order will not terminate the main proceeding as such, but it would terminate an incidental proceeding. The dispute is between the parties and the Joint Receivers as to the amount of remuneration to be fixed That is an independent proceeding in which the rights of the Receivers are determined. Accordingly it could be said that the order had decided an issue between the parties and so far as the Receivers and the parties to such dispute are concerned, there is a termination of the proceeding. Even if it has some relation to the main proceeding itself, it had determined that right as between the parties andt herefore, it would not amount to a judgment falling within clause 15 of the Letters Patent.

6. In fact, an identical question was considered by a Division Bench of the Calcutta High court in *Ali Ismail* v. *Momin Bibi*[1]. In that case by an order, dated 8th December, 1947, a Receiver was appointed and in the same order it was provided—

"...is hereby appointed on a remuneration of five per cent on all collections to be made by him".

He filed his accounts for passing in which he had claimed five per cent on the value of the corpus of the property by way of his remuneration. The parties objected to the claim of remuneration at five per cent on the value of the property and contended that as per the order of appointment he was entitled to only five per cent on all collections made by him. The learned single Judge before whom the matter came up for consideration on a construction of the order appointing the Receiver, held that he was entitled to five per cent on the corpus of the property. Against that order an appeal was preferred. A preliminary objection was raised as to the maintainability of the appeal. The Division Bench held that the order appealed against was a decision between the parties to the appeal, finally determining the rights and obligations of the parties with respect to remuneration. Though there is an interposition of a order appointing receiver and a construction of the terms of the appointment, still the decision of the single Judge in that case was a decision that the receiver was

1. (1967) 2 M.L.J. 1: 80 L.W. 309: I.L.R. (1967) 3 Mad. 227: A.I.R. 1968 Mad. 1.

1. A.I.R. 1952 Cal. 52.

entitled to what he claim d and that was an obligation to which the appellants were bound to submit and it is in that view, it was held that it was a judgment within the meaning of clause 15 of the Letters Patent. We are also of the view that the order of the learned single judge in this case also decided what the Joint Receivers were entitled to and if an appeal could be maintained by the parties against that order, certainly the Receivers, if they feel aggrieved against that order could also file an appeal as, according to them, the obligation of the respondent was to pay them five per cent and if that was not paid they had not discharged their obligation. We are therefore, of the opinion that the decis on now under appeal is also a judgment within the meaning of claus 15 the Letters Patent and this appeal, is maintainable.

7. It was contended by the learned counsel for the third respondent that Order 34, rule 7 of the Original Side Rules on which the Joint Receivers rely for claiming at five per cent on the total value realised by them is not applicable an only the Civil Procedure Code is applicable. Under Order 40, rule 5 of the Civil Procedure Code, the remuneration will have to be fixed with reference to the services rendered by the receiver and the learned counsel also contend d incidentally that an order fixing remuneration under Order 40, rule 2 is also not appealable. We have already pointed out that while referring to the provisions of the Civil Procedure Code, in the matter of consider ing the objections to the order of attachment and direction for sale of investigation of the claims of the Corporation under sub-section (8) of the Industrial Finance Corporation Act, there is no reference to the provisions of the Civil Procedure Code., generally as applicable to proceedings under section 30 of that Act But, since a mortgagee is entitli to a order of sale in an applicati n filed under section 30, it mplies that the Court's ordinary ju isdiction for execution of decrees is invoked and all the powers vested in the Court wolud be applicable for such execution applications. All the powers of the High Court as such exercisable in execution of its decree would therefore; be available to the Court. In exercise of the Original Civil Jurisdiction, the High Court is governed by the Original Side Rules, 1956. Rule 3 of Order 1 of the Original Side Rules provides that except to the extent specifically provided for by those rules, the provisions of the Civil Procedure Code, shall apply to all proceedings. Thus the provisions of the Civil Procedure Code, subject to the modifications mentioned in the Original Side Rules would be applicable to the exercise of ordinary civil jurisdiction by the High Court. The matter also could be looked at from a different angle. Under section 122 of the Civil Procedure Code, the High Court can make rules regulating their own procedure. The preamble to the Original Side Rules specifically states that the Rules are framed by virtue of the powers conferred by the Civil Procedure Code and other enactments set out in Appendix I. In that sense, the modification contained in the Original Side Rules can be treated as part of he Civil Procedure Code also. In any view of the matter. therefore, we cannot exclude the applicability of Order 34, rule 7 of the Original Side Rules to proceedings under section 30 of the Industrial Finance Corporation Act, 1948.

8. The more important question, therefore, is, even if rule 7 of Order 34 of the Original Side Rules is applicable, whether the remuneration fixed by the learned single Judge could be considered to be reasonable or whether the Joint Receivers are entitled to five per cent on the total value realised by them as their remuneration. As we have already stated at the beginning of the judgment, the contention of the learned counsel for the appellants was that the remuneration of the Joint. Receivers will have to be fixed on a percentage of the collections made by the receivers and not as a fixed remuneration on salary basis. Rule 7 of Order 34 of the Original Side Rules, 1956, reads as follows:—

> "Unless the Judge otherwise directs, the receiver shall be entitled on his passing his accounts, to draw from the moneys in Court to the credit of the suit or matter or from the moneys in the bank to the credit of the receivership, the commission at the rate of five per cent on rents, or outstanding recovered, and on sales of properties, movable or immovable, calculated on the total value realised by him."

It may be seen from this provision that normally five per cent on the value realised by him could be claimed by the Receiver as

commission, but that is subject to the condition referred to in that rule itself, namely, 'unless the Judge otherwise directs.' Though the discretion vested in the Court in this regard may be considered to be a judicial discretion, still that a discretion is vested in the Judge to grant less or more than five per cent cannot be disputed. We are also not persuaded to agree with the learned counsel for the appellants that this discretion vested in the judge could only be exercised for the purpose of variation of the percentage and should not be considered as giving a power to fix the remuneration at a fixed figure or on a monthly salary basis.

9. In fact, a clue for understanding rule 7 of Order 34 could be found in rule 4 of that Order read with Form No. 80, referred to therein. Under rule 4, an order appointing a Receiver shall be drawn up in form No. 80. That part of Form No. 80 relating to the remuneration of the Receiver reads as follows:

> "He shall be entitled, on his passing his accounts to draw, from the moneys in Court to the credit of the suit or matter a commission at the rate of 5 pet cent on the net amount collected by him as his remuneration (or to the sum of Rs—per month, or as the case may be), as his remuneration (or, he shall act without any remuneration)."

This will show that at the time of the appointment as Receiver, his remuneration should be fixed and that remuneration could be at a percentage of the amount collected by him or at fixed monthly remuneration. It is true that if it were to be a monthly remuneration that was sought to be fixed at the time of the appointment of Receiver, it would be open to the Receiver to accept the receivership on such commission or reject the same. But that does not mean that if a receiver is appointed without fixing any remuneration at the time of appointment, he will always be entitled to either five per cent or such percentage of the collections as may be fixed by the Court and it is not open to the Court to fix any remuneration later on. We are also unable to agree with the learned counsel that if such a discretion is vested in the Court to fix a remuneration on fixed basis, the receiver loses his right of option either to accept or reject as the work had already been done. This is for the simple reason that the Receiver should be understood to have known that the Court is vested with the power to fix the remuneration at the end of the service on a monthly basis or at the fixed percentage of the collections. Having accepted the office of receivership with the powers of the Court to fix the remuneration at a later date it is not open to the receiver to fix the remuneration himself and claim that he will act only at 5 per cent of the collections and that he would not have acted as receiver for anything less than that figure. Once the remuneration is not fixed at the time of the appointment of receiver, the power is always vested in the Court to fix the remuneration either at a percentage of the collections or at a fixed amount or at a fixed monthly remuneration according to the circumstances of each case. Of course the Judge would be guided by the quantum of work and the other circumstances in each case. In all such matters, therefore, the Court must fix the remuneration with reference to the period for which the receivers worked and the quantum of work turned out by them. In fact, in one of the decisions of this Court reported in *Kabalamurthi Pillai v. Suramanian Pillai*,[1] with regard to the fixing of commission for receivers, this Court observed—

> "....the receiver's commission is in truth the price of the work done by them. It must have some relation to the labour involved and the time taken."

10. We have already noticed that till 21st November, 1979 one set of receivers were functioning and one of them voluntarily relieved himself on that date. The remuneration paid by this Court for the receiver who was relieved on that day was Rs. 2,000 in all. The other Receiver, Mr. Sivaji, continued even after 21st November, 1979. We can therefore, easily fix the remuneration of Mr. Sivaji upto 21st November, 1979 at Rs. 2,000 as it is not possible to make a difference in the remuneration of the junior receiver when the senior receiver is paid separately at that figure. Accordingly, his remuneration upto 21st November, 1979 is fixed at Rs. 2,000. The present joint receivers worked from 21st November, 1979 till 30th May, 1981. The work turned out by them subsequent to 21st November, 1979, as seen from the report No. 7, was the actual publication in news papers, calling for tenders for the sale of the

1. (1931) 60 M.L.J. 332: A.I.R. 1931 Mad. 500.

property. As already noticed, the highest tender made on the first occasion was not accepted by this Court and the receivers were directed to get the value of the land, building and machinery from the Government approved valuers. The receivers obtained such valuation reports from the Government approved valuers and filed the same in Court. Thereafter fresh publication calling for tenders was made throughout India in various newspapers and the highest bid for Rs. 51,51,551, was accepted by this Court. But, that party also failed to pay the balance of the consideration after depositing Rs. 1,00,000, as his initial deposit and the sale was cancelled. Again the receivers published in newspapers calling for fresh tenders and ultimately the tender for a sum of Rs. 50,76,001, was accepted on 3rd Feburary 1981 and the purchaser had also paid the entire amount. One other circumstance also has to be mentioned at this stage. Along with the liquidator, it appears one W. G. Forge and Allied Industries, Bombay who were the lessess of the factory for some of time had some of their own machinery inside the factory which were permitted to be taken out of the factory by an order of this Court. When they sought to remove those machinery, the workers obstructed such removal. On that occasion it appears that both the Joint Receivers were also there in the factory in order to facilitate the easy removal. It appears that the workers did not allow the Joint Receivers to come out of the factory and virtually they were gheraoed till about 11-15 P.M. on that day. Later on, with the help of the Police they had to come out of the factory. The report states that the Joint Receivers had to starve that day and they had also some mentel tension and torture due to the obstruction made by the ex-workers. It is also seen from the report that the ex-workers threatened the Joint Receivers with dire consequences One could easily understand and imagine the situation of that type and the mental agony that would have passed at that time. These are the various factors and work which will have to be taken into account in fixing the amount of remuneration for the receivers.

11. After the sale, the Joint Receivers handed over possession of the factory and its machinery with reference to the inventories taken already. The learned single Judge who heard the matter fixed the remuneration at Rs. 500 per month, but he had not given any reason or basis on which the remuneration was fixed. It appears that the first and the third respondents contended before the learned single Judge that taking into consideration the period for which the Joint Receivers were made to administer the property and the actual work done by them, the remuneration at the rate of Rs. 500 per month to each of the Joint Receivers would be reasonable. Such a contention is also found in the counter statement filed by the first respondent which was adopted by the other respondents. The learned Judge seems to have taken this as the agreement expressed by the parties and as if that is binding on the appellants herein. Since the learned Judge has not fixed the remuneration with reference to the period of work done by the Receivers and the actual work involved, we are of the view that the order concentrating the matter as a discretion vested in the learned single Judge is not binding on us.

12. We have tried to fix the remuneration on various methods and principles and tried to find out what would be the reasonable figure, having regard to the work involved and the period for which the Joint Receivers worked. We find that normally when authorised auctioneers are asked to sell the property, the practice of this Court is to give 2½ per cent of the total realised up to Rs. 50,0 0, and at 1½ per cent for the balance. Rule 5 of Order 38 provides that the Court may under special circumstances upon the application of the party or *suo motu* appoint an advocate or other person as Commissioner to sell the property and may fix as his remuneration a sum certain or a percentage on the net sale proceeds not exceeding the scale fixed by items 29 and 30 of Appendix II of the High Court fees Rules (The reference should be to items 28 and 29 and not items 29 and 30). Items 28 and 29 of Appendix II of the High Court-fees Rules read as follows—

> "28. On the sale of property conducted by the Official Referee, a commission at the rate of 2½ per cent on the net sale proceeds, not exceeding Rs. 50,000 and at the rate of 1½ per cent on the balance.
>
> 29. On the sale of property in partition suits by the Official Referee between the parties for the purpose of partition and for equalising the shares, half the above rates.

It may be seen from the above items that a distinction is made between a sale in a partition suit and a sale in other circumstances. Even treating the proceedings in this case as something akin to a non-partition suit, still the remuneration therein referred to is for the entirety of the work from the time the. Receiver is appointed till the completion of the sale and rendition of accounts. In this case the original Joint Receivers were appointed on 26th July, 1977 and that set of Receivers continued upto 21st November, 1979. The present set of receivers were working only from 21st November, 1979. The remuneration to be fixed, therefore, should be referable to the work done from 21st November, 1979 till 30th May, 1981, alone. The rate of 2½ per cent. upto Rs. 50,00, and at 1½ per cent. on the balance which is applicable to the whole period, therefore, should not be adopted. But, if we were to take that as the proper method, then the total remuneration payable would be as follows. The total amount realised is Rs. 51,91,376 made up of Rs. 50,76,001, the sale consideration, Rs. 1,00,000 the forfeited amount and Rs. 14,375 the sale price of scrap. This can be rounded off for the purpose of easy calculation and it comes to Rs. 52,00,000. The remuneration payable at the rate of 2½ per cent. for the first Rs. 50,000 and at 1½ per cent for the balance would be Rs.78,5000 But, this is payable not only for the present set of two receivers, but also to the person who had already retired as he had also served as Receiver. It is neither possible; nor feasible nor just to pay the remuneration payable to that Receiver to the present set of Receivers. That Joint receiver whe retired had worked for nearly 28 months. If we reduce roughly 1 1/3 of the remuneration as payable to him, the balance will be Rs. 5,25,500. This amount will be the norma amount payable to the present appellants.

13. Another way of calculating the remuneration would be to fix a monthly remuneration. The learned counsel for the respondents after verifying the normal payments made in other High Courts stated that in Bombay the practice is to pay a monthly remuneration ranging from Rs. 500 to Rs. 1, 500. Taking the maximum of Rs. 1,500 as payable for each of the Joint Receivers herein, who have worked for 18 months together from 21st November, 1979, at the rate of Rs 3,000 jointly for them, the remuneration works out to Rs. 5 4,000. We think, this figure of Rs. 54,000, therefore, will be very reasonable in the circumstances of this case. In fact the learned counsel for the third respondent, on instructions from his client stated originally that they would be prepared to pay Rs,50,000 including what was granted by the learned single Judge. But, when it was suggested to him whether they would be willing to pay another sum of Rs. 4,000, the learned counsel very fairly agreed and said that they would be willing to pay another Rs. 4,000, and will have no objection if this were considered reasonable. We think that having regard to all the circumstances, the reasonable remuneration would be Rs. 54,000, for the Joint Receivers. Since both the receivers have worked for 18 months from 21st November, 1997 this remuneration will have to be divided between them equally. Mr. Sivaji, one of the Joint Receivers will be paid Rs. 2,000 for the work done by him along with the other Joint Receiver who was relieved on 21st November, 1979, for the period of his work prior to 21st November, 1979.

14. The learned counsel for respondents wanted that the earlier interim orders made pending this appeal be vacated, but we consider that it is not necessary to make any specific order since, with the disposal of the appeal, all interim orders also lapse subject to the orders in the main appeal itself.

15. The appeal is allowed in part. There will be no order as to costs in this appeal.

S.J. ——— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

Sathyamurthy ... *Petitioner**

v.

Sri Vasan Finance Corporation by its Managing Partner V. Mannu Chetti ... *Respondent.*

Civil Procedure Code (V of 1908), section 51 and Order 21, rules 37, 38 read with 40—Scope and applicability—Duty of executing Court.

It is a fundamental principle of any jurisprudence, that a Court armed with the extraordinary power of arrest of a debtor for the debt incurred by him should take into consideration and apply its mind to the several circumstances placed before it and come to a definite conclusion about the sufficiency of the means of the debtor to satisfy the decree-debt. [*Para.* 4.]

An admission of a claim to a share in immovable property is not enough to hold the judgment-debtor liable to arrest under section 51 and Order 21, rules 37 and 38 read with rule 40 of the Civil Procedure Code.

Nothing has been elcited in the instant case in the cross-examination of the judgment-debtor which will be helpful for upholding the contention that the admission on the part of the petitioner herein is sufficient to come to the conclusion that he had means for satisfying the debt as contemplated by the provisions of section 51, Civil Procedure code, or by the provisions of Order 21, rules 37 and 38 read with rule 40 of the Code. It has not been elicited in the cross-examination as to what interest he has got in the property in which he has admittedly made a claim. An admission of a claim with respect to a share in an immovable property is not enough to hold that the person is liable to be incarcerated under the above provisions. Section 51 provides that the Court's satisfaction must be entered for good reasons which are to be recorded in writing in the order. The order under revision is bereft of such a conclusion on reasons. [*Para.* 5.]

Cases referred to:—

K. P. Mohamed Ibrahim v. *State Bank of Travancore*, (1963) 2 M.L.J. 552: 76 L.W. 787: A.I.R. 1964 Mad. 233; *Anama Gounder* v. *A. C. Ponnusami*, (1981) 94 L.W. 683; *Jolly George Varghese* v. *The Bank of Cochin*, (1980) 2 S.C.C. 360: A.I.R. 1980 S.C. 470.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif of Tiruvannamalai, dated 27th August, 1980 and made in R.E.P. No. 266 of 1980 in O. S. No. 427 of 1977.

R. Chandrasekaran, for *R. Nandakumar* and *S. Gopalaratnam*, for Petitioner.

G. Krishnan for Respondent.

The Court made the following

ORDER.—This revision petition raises a very interesting question of law which, of course, arises in turn out of the consideration whether the order of the Court below, chich is the subject-matter of this revision petition is revisable under section 115, Civil Procedure Code. Mr. R. Chandrasekaran, learned counsel for the petitioner contends that the lower Court had not taken into consideration whether the judgment-debtor has got sufficient means to pay the debt in accordance with the provisions of section 51 Civil Procedure Code, as well as Order 21, rules 37, 38 and 40, Civil Procedure Code, and as such, this order under revision is liable to be revised by this Court. On the other hand, Mr. G. Krishnan, learned counsel for the respondent submits that it is not as if the judgment-debtor has not gone into the box and deposed about the situations that are prevailingat the time of the hearing of R.E.P. No. 266 of 1980. The order made in the above petition, *i.e.*, R.E.P. No. 266 of 1980 is now the subject-matter of this revision. In fact, the learned counsel for the respondent had himself admitted that he has got a share in a property to which he had made a claim in a suit that has been pending in the Sub-Court, Tiruvannamalai, and this is quite adequate to satisfy an order as prayed for under the provisions of Order 21, rules 37 and 38, Civil Procedure Code under which provision the petition was filed by the decree-holder for the realisation of the decree amount by arrest and detention of the petitioner herein. In this

*C.R.P. No. 3219 of 1980. 12*th November*, 1981.

regard, the learned counsel for the respondent refers to a decision in *K. P. Mohamed Ibrahim* v. *State Bank of Travancore, Trivandrum*[1] for the following proposition:

"It is not correct to say that the word 'means' occurring in clause (*b*) to proviso to section 51 should be taken as equivalent to cash· "Means" there only mean realisable assets, and where the judgment-debtor has got sufficient assets from out of which the necessary moneys can be realised to pay up the decree amount, he will not be exempted by the provisions of section 51 from being proceeded against personally by detention in prison for the realisation of the amount due under the decree".

2. The learned counsel for the respondent further refers to the observations of his lordship S. Ramachandra Iyer, CJ., at page 234 and they are as follows:

" In this appeal against the order of the executing Court, Mr. R Gopalaswami Aiyangar first contended that, as there has been no refusal by the appellant to pay the moneys due under the decree the execution application was "premature". We are, however, unable to agree with that contention. After the filing of the execution, the appellant filed a counter affidavit, objecting to his liability to pay the decree amount, as according to him, the execution petition was premature. If the execution application were held to be maintainable, that would certainly amount to a refusal to pay.

It was next argued that, as the appellant had not the means to pay the money due under the decree, no personal execution should be levied against him. It is admitted that the appellant is in possession of considerable properties which would easily enable him to pay off the decree. But what is argued is that the word "means" occurring in section 51 should be taken as equivalent to cash, and as the appellant says that there was no cash available with him, the order for arrest should not have been made. We are unable to accept that argument either. "Means" occurring in section 51 can only "mean" realisable assets, and, as there is no doubt that the appellant has got sufficient assets from out of which the necessary moneys can be realised to pay up the decree amount, he will not be exempted by the provisions of section 51 from being proceeded against personally for the realisation of the amount due under the decree.

But the more substantial point that has been urged on behalf of the appellant is whether the execution application is maintainable or whether it is premature. From what we have stated above, it will be clear that the personal decree which is passed against the second defendant would become available for execution only after the properties of the first judgment-debtor had been exhausted, or, when otherwise they could not be brought to sale. In that view, the present execution application must be held to be premature. The remedy of the decree-holder will be first to proceed against the mortgaged properties "and exhaust them, and, if there is a balance left, the Bank will have to apply for a personal decree against the first judgment-debtor and it can, by virtue of the present preliminary decree, enforce that remedy against the second judgment-debtor also personally concurrently therewith.

But Mr. Ratan, appearing for the Bank, has referred us to the judgment in the case to show that it does not contemplate the decree-holder waiting for execution of the decree as against the second judgment-debtor till the properties are exhausted. Issues 1 and 3 in the suit related to the question whether the second defendant was only a surety and whether he was liable for the suit claim. These points were answered in favour of the plaintiff. By his written statement, the second defendant claimed that the plaintiff should be directed to proceed against him only if the decree amount were not realised from the first defendant and his properties. It was evidently this request that was acceded to in the judgment which directed a separate decree being passed against the second defendant without any direcd tion that the decree against the secon-defendant should concurrently subsist with the mortgage decree against the first defendant".

1. (1963) 2 M.L.J. 552; 76 L.W. 787: A.I.R. 1964 Mad. 233.

On the other hand, the learned counsel for the petitioner refers to a decision in *Anama Gounder* v. *A. G. Ponnusami*[1] for the following proposition:

"A reference to section 51, Civil Procedure Code, would show that it is the bounden duty of the execution Court to satisfy itself that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof, but all the same refuses or neglects or has refused or neglected to pay the same. Section 51 insists that the Court's satisfaction must be entered for good reasons which are to be recorded in writing in the order. The provisions of section 51 do not depend for their implementation on the attitude which the judgment-debtor might take when notice goes to him in the execution petition.

Whether or not the judgment-debtor resists the execution petition and whether or not the judgment-debtor denies that he has means the Court cannot shirk the responsibility under the Code of instituting an enquiry to find out whether the judgment-debtor has the requisite means to pay and yet wilfully refuses or neglects to pay the amount. Where a debtor is sought to be arrested and put in civil prison for non-payment of a decree-debt, the execution Court cannot rely for the support of its order entirely on the state of the pleadings of the judgment-debtor.

Order 21, rule 40(1) further shows that even where the decree-holder produces evidence as to the means of the judgment-debtor, still it would be essential for the Court to give the judgment-debtor, an opportunity of showing cause as to why he should not be committed to civil prison. This opportunity is over and above the opportunity aforesaid by the service of notice of the execution petition".

3. In the above decision of this Court, the decision rendered by the Supreme Court in *Jolly George Varghese* v. *The Bank of Cochin*,[2] is also referred to. In that decision Krishnan Iyer, J. had shown how gruesome and obnoxious is the remedy of incarcerating a debtor for an unpaid debt or under modern conditions and in the context of Human Rights. The said decision of the Supreme Court also reveals to us that while learned Judges, who have to administer old laws may have to guard themselves against over-reaction to modern trends in social jurisprudence, they may at least observe the requirements of the law in a matter such as arrest and detention in civil prison of judgment-debtor.

1. (1981) 94 L.W. 683.
2. (1980) 2 S.C.C. 360 A.I.R. 1980 S.C. 470.

4. Bearing in mind the observations of the Supreme Court in the above decision in *Jolly George Varghese* v. *The Bank of Cochin*,[1] this Court considers that even a minimum adherence to the requirement of the Court of the relevant provisions of the Code had not been complied with in the present case by the lower Court and, as such, the order becomes revisable. In other words, this revision petition is to be allowed, because there is absolutely no material available on record to come to a definite conclusion that the petitioner herein has got sufficient means to discharge the debt, for which the respondent herein wanted the remedy of arrest. It is the fundamental principle of any jurisprudence that a Court, which had been armed with such an extraordinary power of arrest for the debt incurred by a debtor, especially when such a prayer is made by the creditor, should take into consideration and apply its mind to the several circumstances that are placed and come to a definite conclusion as to whether the sufficiency of the means or satisfying the decree debt has been established or not. This is actually what has been laid down by the Supreme Court in *Jolly George Varghese* v. *The Bank of Cochin*[1] which has been followed by this Court in *Anama Gounder* v. *A. C. Ponnuswami*.[2]

5. Nothing has been elicited in the cross-examination of R. W. 1, Sathyamurthy, the judgment-debtor which will be helpful for upholding the contention raised by the learned counsel that the admission on the part of the petitioner herein as R.W. 1 before the lower Court is sufficient to come to the conclusion that he had means for satisfying

1. (1980) 2 S.C.C. 360: A.I.R. 1980 S.C. 470.
2. (1981) 94 L.W. 683.

the debt as contemplated by the provisions of section 51, Civil Procedure Code, or by the provisions of Order 21, rules 37 and 38 read with rule 40 Civil Procedure Code. It has not been elicited in the cross-examination as to what interest he has got in the property in which he has admittedly made a claim. An admission of a claim with respect to a share in an immoveable property is not enough to hold that the person is liable to be incarcerated under the above provision. The only answer that this Court could give at this juncture on the evidence available on record is in the negative, because section 51. Civil Procedure Code, clearly lays down that it is the boundan duty of the execution Court to satisfy itself that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of decree or some substantial part thereof, but all the same refuses or neglects or has refused or neglected to pay the same. What is more, section 51 further provides that the Court's satisfaction must be entered for good reasons which are to be recorded in writing in the order. The order under revision is benefit of such a conclusion on reasons. Therefore, this is a fit and proper order to be revised undes section 11ς Civil Procedure Code, and it is hereby revised.

6. This Civil Revision Petition is allowed. Under the circumstances of the case, there will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICTURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

T.S. Yusuf, Executive Trustee and others. ... *Petitioners**

v.

Tamil Nadu Wakf Board by its Secretary having Office at Santhome High Road Mylapore, Madras-4. ... *Respondent.*

Wakf Board Aat (XXIX of 1954.) section 15 (1)—Scheme framed by Civil Couri for administratian of wakf—Subsequent application by Wakf Board for transfer of the absolute coutrol of the Wakf—Board's power to manage and appoint trustees upheld.

Under section 15 of the Wakf Act the power of superintendence and control over the day-to-day administration of the wakf vested in the Wakf Board and that can take within its ambit the power to appoint trustees for the wakf in accordance with any scheme framed by the civil Court.

In the instant case, the Wakf Board did not seek to substitute itself in the place of the civil Court or take upon itself the authorship of the scheme. The Wakf Board merely wanted a direction that as the power of general superintendence and control has vested with them under section 15 of the Wakf Act, 1954 they should be permitted to adminisiter the wakf and manage the wakf properties in pursuance of the scheme instead of approaching the Court from time to time in routine matters such as management, appointment of trustees etc. As the power of administration vested with the Board under section 15 includes the power to appoint "muthavallis" to manage and administer the wakf property, the Wakf Board has certainly the power to appoint trustees in accordance with the scheme framed by the Court.

As per the scheme framed by the Court, the Board of Trustees should consists of five members, one of whom will be the hereditary trustee, another to be elected by the pangalis and the remaining three trustees to be nominated by the Court. The scheme

*C. R. P. No. 1629 of 1980. 23rd October, 1918.

was framed before the Wakf Act came to be enacted. After the passing of the Wakf Act, 1954 it is unnecessary for the Court to continue management and supervision of the wakf properties and instead of the Court being burdened with such functions, it is desirable that the management, control and administration of the institution are carried on by the Wakf Board as per the scheme framed by the Court. Viewed in this light, the Wakf Board has certainly the power to appoint trustees to the wakf in question in accordance with the scheme framed by the Court. [*Para 3.*]

Cases Referred to—

Advocate Genaral of Madras v. *Kuppuswami Gurukkal*, (1947) 2 M.L.J. 198: I.L.R. (1948) Mad. 542: 60 L.W. 505: A.I.R. 1948 Mad. 168; *Syed Jreershah* v. *Tamil Nadu Wakf Board by its Secretary*, (1976) T.L.N.J. 209.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge (Principal), Tiruchirapalli dated 9th April, 1980 and made in I. A. No. 99 of 1978 O. S. No. 91 of 1925.

T. R. Rajagopalan, for Petitioners.

F. A. Rasheed, for Respondent.

The Court made the following

ORDER.—The civil revision petitioners are the trustees appointed by the Court for the administration of the suit wakf in pursuance of a scheme framed by the Court. The respondent in the civil revision petition is the Tamil Nadu Wakf Board, represented by its secretary. The respondent filed an application before the trial Court for transfer of the absolute control of the wakf and its property for the day to-day management, including the power to appoint muthavallis, on the ground that after the passing of the Wakf Act 1954 the general superintendence of all wakf vest in the wakf Board under section 15 (1) of the Act. The application was resisted on the ground that the wakf is not a wakf as defined under the Wakf Act, 1954 and the Wakf Board cannot administer such a wakf and the administration of wakf by the trustees appointed by the Court has been above repreach and as such there is no necessity for interfering with the provitions of the Schme framed by the Court.

The trial court held that—

"1. The suit wakf is a publie wakf and it must be treated as a wakf by user coming within the purview of the wakf Act, 1954.

2. The suit wakf is a composite wakf in which the pangalis of the saint are entitled to 2/5 share in the surplus income and the wakf comes within the purview of the Wakf Act.

3. The Wakf Board is entitled to take control and management of thn affairs of the wakf by virtue of the powers conferred under section 15 of the Act."

"(4) The power of general superintendence conferred under section 15 of the Act includes the power to appoint and remove muthavallis, and instead of the Court appointing the trustees as per the scheme, the Wakf Board will appoint the trustees as per the scheme and it is not a case where the Wakf Board is seeking to substi ute its name in the place of a civil Court in the scheme framed by it; and the day today administration or the trust includes appointment of trustees in accordance with the scheme decree."

2. On these findings the petition was allowed and the respondents have now filed the civil revision petition before this Court.

3. Relying on the decision of this Court reported *in Advocate General of Madras* v. *Kuppuswami Gurukkal*,[1]: the learned counsel for the petitioners contended that appointment of a trustee is not an act of administration of a trust and it is merely effecting the appointment of a person who will carry out the administration and under the guise of taking charge of the day-to-day administration of the wakf, the respondent cannot be permitted to appoint trustees and the trustees have to be appointed only by the Court as per the scheme decree. The case relied on by the learned counsel for the petitioners is a case arising under section 75-A of the Madras Hindu Religious Endowments Act, 1927. As the word "*Administration*" has not been defined in the said Act, the Court held that the appointment of a trustee is not an act of administration and it is merely making

1. (1947) 2 M.L.J. 198: I.L.R. (1948) Mad. 542: 60 L.W. 505: A.I.R. 1968 Mad. 168.

the appointment of a person who will carry out the administration. However, in the instant case, uuder section 15 of the Wakf Act, Wakf Board has got powers to settle schemes of management for the wakf and also for the appointment and removal of muthavallis in accordance with the provisions of the Act. So the general power of superintendance vested with the Board under section 15 includes the power to appoint and remove muthavallis. "Muthavallis" has been defined under the Act to include any person or committee for the time being managing or administering any wakf property as such. It therefore, follows that under section 15 of the Wakf Act, the power of superintendence and control over the day to day administration of the wakf vested with the Board and that can take within its ambit the power to appoint trustees for the wakf in accordance with the scheme framed by the Court. This Court, in the decision reported in *Syed Feershah and another* v. *Tamil Nadu Wakf Board by its secretary*.[1] held that when a scheme has been framed by a civil Court prior to the Wakf Act, then it shall prevail and it shall be taken as the basis for the Wakf Board for administering the wakf for which the scheme has been framed and it is open to the wakf Board to be in charge of the day-to-day administration and management of the wakf such as appointment of trusttees, in accordance with the scheme. In the instant cose the Wakf Board does not seek to substitute itself in the place of the civil Court or take upon itself the authorship of of the scheme. The Wakf Board merely wanted a direction that as the power of general superintendanee and control has vested with them under section 15 of the Act, they should be permitted to administer the wakf and manage the wakf properties in pursuance of the scheme instead of appreaching the Court from time to time in routine metters such as management appointment of trustees etc. As the power of administration vested with the Board under section 15 includes the power to appoint "muthavallis" to manage and administer the wakf property, the Wakf Board has certainly the power to appoint trustees in accordance with the scheme framed by the Court. As per the scheme framed by the Court, the Board of Trustees should consist of five members, one of whom will be the hereditary trustee, and the other to be elected by the pangalis and the remaining three trustees to be nominated by the Court from among the Muslim residents of Tiruchi Municipality. The scheme was framed before the Wakf Act came to be enacted. After the passing of Wakf Act, 1654, it is unnecessary for the Court to continue management and supervision of the wakf properties and instead of the Court being burdened with such function, it is desirable that the management control and administration of the institution are carried on by the Wakf Board as per the scheme framed by the Court. Viewed in this light, the Wakf Board has certainly the power to appointtrustees to the wakf in question in adcordance with the scheme framed by the Court.

4. The learned counsel for the petitioners contended that unless the scheme is amended, the nomination of the three trustees from among the Muslim residents of the Tiruchi cannot be done by the Wakf Board. As the nomination of the three trustees from among the Muslim residents of Tiruchy as per the scheme is only an act of administration which the Wakf Board is competent to perform under section 15 oj the Wakf Act, it is unnecessary to go in for amendment of the scheme before this power can be exercised by the Wakf Board.

5. The learned counsel for the petitioners next contended that the Wakf Board can appoint trustees under the Wakf Act and not in pursuance of the scheme framed by the Court. This argument again overlooks the fact that the power of superintendence, control and administration vested with the Board under section 15, carries with it the power to appoint trustees for the manegement and administration of the wakf properties.

6. In the result, the civil revision petition stands dismissed. Parties to bear their own costs.

R.S. —— *Petition dismissed.*

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1. 1976 T.L. N.J. 209.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Sethuraman, JJ.*

The Proprietor M/s. Sri Rajeswari Transports (Firm), Theni .. *Appellant* *

v.

M. G. Rajan and others .. *Respondents*.

Motor Vehicles Act (IV of 1939), section 95 (2)—Accident due to collision of Government Jeep and a Bus—Bus passenger sustaining injury—Claim for compensation—Comprehensive Insurance Policy—Policy restricting insurer's liability to Rs. 50,000—Insurer's liability held not unlimited.

Held, In this case, the Tribunal had limited the liability of the Insurance Company to Rs. 50,000. It seems to have been based not only on section 95 (2) of the Motor Vehicles Act, but also on the terms of the insurance policy. It is no doubt true that the policy in this case is a comprehensive one. However the policy itself restricts the insurer's liability to Rs. 50,000 in respect of death or bodily injury to any person caused or arising out of the use of the motor vehicle. So, in respect of death or bodily injury to third parties, the policy limits the liability of the insurer to Rs. 50,000. Even in a comprehensive policy it is open to the insurer to limit its liability. If the insured wants a policy with an unlimited liability then he should have bargained for such a policy and paid the requisite premium for such an unlimited liability. But in this case, the parties have agreed that the limit of liability in respect of third party to be borne by the insurer should be Rs. 50,000 and having paid premium on that basis, it is not open to the insured to ignore the terms of the insurance policy and claim to make the Insurance Company liable for more than Rs. 50,000. If the limit of Rs. 50,000 has not been mentioned in the policy, and it has merely restricted the liability of the insurer under section 95 (2) of the Mortor Vehicles Act then it is possible to say that the liability of the insurer is unlimited being a comprehensive policy. But as here the comprehensive policy has limited the liability of the insurer to Rs. 50,000 it is not possible to make the insurer liable for an unlimited amount merely because the policy is a comprehensive one. [*Para.* 7.]

K. Sengattiian, for Appellant.

K.S. Narasimhan, for Respondent.

The Judgment of the Court was delivered by

Ramanujam, J.— Since all these matters arise out of the claim petitions filed in respect of the same accident, they are dealt with together.

2. On 14th June, 1978 at about 3-00 P.M. there was a collision between Jeep TNU. 5282 belonging to Theni Allinagaram Municipality and the bus TNU 4725 belonging to one Rajeswari Transports, near Nallakaruppan-patti in Periakulam-Batlagundu Main Road. The officers of the Allinagaram Municipality were proceeding in the jeep to Dindigul for the purpose of having consultation with their advocate and the officers who travelled in the jeep were the Special Officer, the Municipal Engineer, one Narayanaswami and one Sanitary Inspector by name Jayavelu, apart from the driver. As a result of the impact, all the occupants of the jeep sustained grievous injuries. After getting treated for those injuries. the injured filed claim petitions before the Motor Accidents Claims Tribunal, Madurai, claiming various amounts as compensation in respect of the injuries sustained by them respectively.

3. The said claim petitions, O.P. Nos. 204, 205, 206 and 208 of 1978 were opposed by the owner of the bus, the proprietor of Sri Rajeswari Transports, and the Insurance Company with which the bus had been insured. Their case was that there was a curve on that portion of the road where the accident took place, that the jeep was driven by its driver in a rash and negligent manner without sounding horn and at a terrific speed in the curve, that the bus driver who was coming in the opposite direction was attempting to overtake a lorry and at that time, the jeep came rashly and negligently and hit against the bus. They also contended that the compensation cliamed in each of the claim petitions was in any event excessive. Thus, in the face of the above pleadings, the trial Court set down the following three questions for consideration:

*C. M. A. Nos. 439, 440 and 441 of 1979 and C. R. P. No. 2413 of 1979 and Memo of Cross. Objections in C.M. A. No. 440 of 1979. *21st July*, 1981.

(1) Whether the petitioner in M.A.C.O. Ps 204, 205 206 and 208 of 1978 were injured on account of the rash and negligent driving of the bus T.N.U. No. 4725 by its driver;

(2) What is the quantum of compensation each of the petitioners is entitled?

Though there was another issue as regards the damage sustained by the jeep, it is unnecessary to consider the said issue in these appeals, as there is no appeal relating to the extent of the damage sustained by the jeep.

4. The Tribunal, after considering the evidence adduced by the parties, both oral and documentary, held that the accident was solely due to the rash and negligent driving of the bus by its driver and that the driver of the jeep has not been shown to have been rash and negligents. Coming to the quantum of compensation, the Tribunal has awarded various sum; as compensation, to the claimants in each of the claim petitions, the details of which will be noted and discussed a little later. The Tribunal, however, held that so far as the Insurance Company is concerned, its liability is restricted to Rs. 50,000 in all, and that, therefore, its liability to each of the claimants has been proportionately fixed subject to its liability being limited to Rs. 50,000. The owner of the vehicle has filed these appeals and the civil revision petition challenging the award of the Tribunal, contending that the amounts awarded by the Tribunal to the various claimants are excessive. The learned counsel for the appellant has also raised a legal plea that the policy in this case being comprehensive, the liability of the Insurance Company should be taken to be unlimited and cannot be restricted to Rs. 50,000 on the basis of the provisions of section 95 (2) of the Motor Vehicles Act.

5. The claimants in O. P. No. 205 of 1979 who are the respondent in C. M. A. No. 440 of 1979 have filed a Memo. of Cross Objections claiming a higher compensation.

6. Thus the questions that arise for consideration in all these matters are—

(1) Whether the accident occurred solely due to the rash and negligent driving of the bus by its driver?

(2) Whether the compensation awarded to each of the claimants by the Tribunal is fair and reasonable? and

(3) Whether the liability of the Insurance Company in this case can be legally limited to Rs. 50,000 as had been held by the Tribunal?

7. We would like to dispose of the third question as to the extent of the liability of the Insurance Company first. The learned counsel for the appellant, relying on the decision of this Court in *M/s. Oriental Fire and General Insurance Company Ltd.* v. *Ganapathi Ramalingam*[1] contends that since the policy issued by the insurer in respect of the bus in question is a comprehensive one, the insurer's liability should be taken to be unlimited. It is true, in that case, a Division Bench of this Court to which one of us was a party, has held that limitation of liability against Insurance Company upto to Rs. 50,000 towards compensation in respect of passengers or persons other than a passenger contained in section 95 (2) of the Motor Vehicles Act, is inapplicable to third parties when the policy is a comprehensive one. In this case, that the Tribunal has limited the liability of the Insurance Company to Rs. 50,000 seems to have been based not only on section 95 (2) of the Motor Vehicles Act, but also on the terms of the policy, it is no doubt true that the policy in this case is a comprehensive one. However, the policy itself restricts the insurer's liability to Rs. 50,000 in respect of death or bodily injury to any person caused or arising out of the use of the motor vehicle. So, in respect of death or bodily injury to third parties, the policy limits the liability of the insurer to Rs. 50,000. It cannot be doubted, even in a comprehensive policy it is open to the insurer to limit its liability. If the insured wants a policy with an unlimited liability, then he should have bargained for such a policy and paid the requisite premium for such an unlimited liability. But in this case, the parties have agreed that the limit of liability in respect of third party to be borne by the insurer should be Rs. 50,000, and having paid permium on that basis, it is not open to the insured

1. (1981) 2 M.L.J. 39: (1981) 94 L.W. 290: A.I.R. 1981 Mad. 299.

to ignore the terms of the insurance policy and claim to make the Insurance Company liable for more than Rs. 50,000. If the limit of Rs. 50,000 has not been mentioned in the policy, and it has merely restricted the liability of the insurer under section 95 (2), then it is possible to say that the liability of the insurer is unlimited, being a comprehensive policy. But as here the comprehensive policy has limited the liability of the insurer to Rs. 50,000, it is not possible for us to make the insurer liable for an unlimited amount merely because the policy is a comprehensive one. We have, to therefore, hold that in this case eventhough the policy is a comprehensive one, the insurer's liability is not unlimited, as the so-called comprehensive policy itself limits the liability to Rs. 50,000. Thus the legal submission put forward by the learned counsel for the appellant fails.

8. Coming to the question as to whether the accident was solely due to the rash and negligent driving of the appellant's bus by his driver, we see no reason to differ from the view taken by the Tribunal. The Tribunal has dealt with the evidence in detail and has chosen to give a finding that the driver of the bus was responsible for the accident. Exhibit P-5 the sketch drawn by the police in the course of the investigation clearly shows that the driver of the bus should have been negligent in driving the bus. The sketch (Exhibit P-5) shows that the jeep was proceeding from west to east and there was a collision between the bus and jeep on the northern extremity of the road. At the place of the accident the tarred portion is about 325 cm. in width and the road has mud shoulders on both sides, measuring roughly about 240 cm. There are culverts just west of the scene of occurrence. The jeep was found more or less on the northern extremity of the mud shoulder formed on the northern side of the road and the bus was virtually on the mud portion of the north. The position of the vehicles at the time and after the impact clearly shows that it is the driver of the bus who should have been rash and negligent and not the jeep driver. A perusal of the sketch also shows that bus was completely on the wrong side. The bus driver has gone to the extreme north blocking the way for the jeep. It is common ground that the accident was ot due to any mechanical trouble in the bus. Exhibit R-4, the photograph of the two vehicles immediately after the accident indicates that the right front wheel of the bus and the left front wheel of the jeep are on the mud portion, that as a result of the collision, the jeep's front portion went below the right side front of the bus and that the front portion of the jeep was found smashed. Apart from these factors, the jeep driver has been examined as P.W.1. and he has deposed that he sighted a lorry coming fast in the opposite direction and the bus coming behind the lorry, that the bus driver with a view to overtake the lorry came straight to the middle of the road fearing that the bus might hit the jeep, he swerved the jeep to the mud portion, but inspite of his effort the bus driven rashly came and collided with the jeep. Apart from this, there is the evidence of P.Ws.2 to 4, the other occupants of the jeep, and their evidence also indicates that the accident was purely due to the rash and negligent driving of the bus by its driver. We have to therefore, agree with the Tribunal that the accident was due to the rash and negligent driving of the bus by its driver.

9. Coming to the question of the quantum of compensation, it is seen that the Tribunal has awarded Rs. 25,000 to the claimant in O.P. No. 204 of 1978, Rs. 8,810 to the claimant in O.P. No. 205 of 1978, Rs. 1,155 to the claimant in O. P. No. 206 of 1978 and Rs. 22,750 to the claimant in O. P. No. 208 of 1978. Mr. Sengottian, the learned counsel for the appellants in all these cases has questioned the award of the Tribunal under various heads in the various O.Ps. Having regard to the nature of the claims made in the various claim petitions, we have to deal with the claim petitions separately.

10. In O.P. No. 204 of 1978 out of which C.M.A. No. 439 of 1979 arises, the claimant is the driver of the jeep, aged about 25 years at the time of the accident. He claimed in all Rs. 60,000 as compensation, under various heads such as Rs. 25,000 for loss of earning, Rs. 2,000 for partial loss of earning, Rs. 2,000 as transport charges to the hospital, Rs. 1,000 under the head 'others', Rs. 25,000 for permanent disability, and Rs. 5,000 for mental shock and loss of future expectation of life. The Tribunal has awarded a sum of Rs. 7,500

under the head 'loss of earning' and Rs. 500 under the head 'others', Rs. 13,000 under the head 'permanent disability' and Rs. 2,500 for 'pain and suffering' as also towards 'loss of future expectation of life.' The claimant has sustained a fracture of lower third of right femur upper thigh, apart from lacerated wounds. He was unconscious for a period of four days since the date of accident and recovered conseiousness only on 18th June, 1978. Even after treatment it is found that the bones have not fused and he was in bed firstly for two months and thereafter, he was advised operation. Even after operation, it is found that he is unable to use his right leg which is very important for carrying on his work as driver. A part from this, it is seen that the claimant has also sustained injury in his eye and he has lost vision of his right eye. P.W. 5 who is an Eye Doctor has deposed that for driving, the claimant required binocular vision and with the monocular vision he is unfit to be a driver. He has given a disabiiity certificate stating that the permanent disability of 40 per cent and it is partial. P.W. 6, another doctor working in Orthopaedic section of the Erskine Hospital has deposed that he conducted an operation on the claimant and he inserted a steel rod and screw for the purpose of holding the leg in position and that even after the treatment. P.W. 1 cannot use his leg, that he is unfit to drive a vehicle and even after fusion he will not be in a fit condition to drive a vehicle. The claimant was getting a salary of Rs. 335 p.m. as driver of the jeep. Now that he is found unfit for the job for which he was engaged, he should be taken to have lost his earning capacity as a result of the permanent disability. His right eye has been lost for ever and he has to be helped by someone for his movements. Taking into consideration all these factors, the Tribunal has awarded a sum of Rs. 7,500 towards 'loss of earnings' and Rs. 1,500 as cost of transport to Hospital and Rs. 500 under other heads and Rs. 13,000 as permanent disability and Rs. 2,500 for pain and suffering. Though the learned counsel for the appellant contends that the compensation awarded under each of the heads is excessive, we are not in a position to interfere with the award, except under two heads. The Tribunal having found that the claimant had been retained as a driver and he is being paid the same salary by the employer, the award of Rs. 7,500 towards 'loss of earning' cannot be sustained *inito*. Though we cannot accept the contention of the learned counsel to the full extent since the claimant has not suffered any loss in earnings, the awaard of Rs. 7,500 towards 'loss of future earnings' appears to be somewhat excessive. Even though there is no actual loss of earning, the fact that the claimants has sustained 'loss of earning capacity' as a result of the permanent disability, cannot be disputed. Therefore, towards 'loss of earning capacity' we are inclined to award a sum of Rs. 5,000, in the place of Rs. 7,500 awarded by the Tribunal under the head 'Loss of future earnings". The Tribunal has awarded a sum of Rs. 500 under the head 'other's. We do not see how the Tribunal can award any amount as compensation without specifiying the head under which it is awarded. Under the enumerated heads, the various amounts have been awarded and in addition, the Tribunal has awarded aoother sum of Rs. 500 without specifying any head. We have, therefore, to set aside that portion of the award granting a sum of Rs. 500 under the head 'others.' Thus we allow C.M.A. No. 439 of 1979 in part and reduce the compensation to Rs. 22,000.

11. Coming to O.P. No. 205 of 1878 out of which C.M.A. No. 44 of 1979, arises, the claimant had claimed in all Rs. 27,000 and the Tribunal has awarded a sum of Rs. 8,810. The claimant is the Special Officer of Theni Allinagaram Municipality and he is aged 40 years. As a result of the accident, the claimant sustained a lacerated wound on the right parietal region of the hand, a cut in the centre of the nose and an incised wound over the chin and a lacerated wound at the right leg. He was admitted in the hospital where he was in-patient for a period of 16 days. According to the claimant, even after the prolonged treatment, he is unable to climb the steps leading to the first floor of the office and therefore he has to shift the office to the ground floor. He also complains as P.W. 3 that he is unable to sit and case himself and he has to sit on a stool for that purpose. According to him, he has suffered a permanent disability, and therefore, he

has to be compensated suitably. The disability certificate which has been marked as Exhibit P-58 shows that he has suffered 10 per cent loss in the movement of the knee. The claim of Rs. 27,000 consists of Rs. 1,540 towards 'loss of leave credit', Rs. 200 towards cost to transport to the hospital. Rs. 10 as damage to the clothing, Rs. 150 towards damage watch, Rs. 100 towards medical expenses, Rs. 10,000 towards pain and suffering, and Rs. 15,000 towards permanent disability. The Tribunal awarded in all a sum of Rs. 8,810. Not satisfied with the award of the Tribunal. the claimant has filed memorandum of cross objections claiming a higher compensation. In respect of various claims the Tribunal disallowed the amounts claimed under the head 'loss of leave credit' and also 'cost of watch' etc. The substantial amounts granted by the Tribunal consisted of two heads 'Pain and Suffering' and Permanent Disability'. Though according to the appellant, the Tribunal is in error in awarding such a high amount of Rs. 7,500 under the head 'Permanent Disability' the counsel for the claimant would submit that the amount awarded both under the head 'Pain and Suffering' and 'Permanent Disability' is too meagre. Having regard to the nature of the injury sustained which has left a permanent mark on the person of the claimant and the difficulty felt by the claimant in the movement of his leg as well as his difficulty in getting up the stairs and in the face of the disability certificate showing 10 per cent loss in the movement of the knee, the claimant can be awarded at least a sum of Rs. 9,500 under the head 'Permanent Disability' and a sum of Rs. 2,000 under the head 'Pain and Suffering) having regard to the prolonged period of treatment. Thus, in all we award a sum of Rs. 11,810 to the claimant in this case, as against Rs. 8,810 awarded by the Tribunal. The award of the Tribunal in O.P. No. 205 of 1978 is, therefore enhanced to Rs. 11,810 from Rs. 8,810. C.M.A. No. 440 of 1979, is therefore, dismissed. The memo of Cross Objections is allowed to the extent indicated above.

The enhanced amount awarded by us will carry the same interest and from the same date as directed by the Tribunal.

12. In O.P. No. 208 of 1978 out of which C.M.A. No. 441 of 1979 arises. the claimant is the Municipal Engineer and he was 39 years old at the time of the accident. He has claimed a sum of Rs. 50,000 as compensation against which the Tribunal has awarded a sum of Rs. 22,750 under various heads. The learned counsel for the appellant contends that the award of Rs 2,500 under the head 'Shortened Expectation Life' is not justified, especially when the Tribunal has awarded compensation of Rs. 15,000 under the the head 'Permanent Disability'. We are inclined to agree with the learned counsel for the appellant that once the compensation is awarded under the head 'Permanent Disability', no separate amount could be awarded under the head 'Shortened Expectation of Life'. We have to therefore set aside the award given by the Tribunal under the head 'Shortened Expectation of Life'. We have to therefore reduce the award of the Tribunal from Rs. 22,750 to Rs. 20,250. C.M A. No. 441 of 1979 is partly allowed to the extent indicated above.

13. The claimant in O.P. No. 206 of 1978 out of which C.R.P. No. 2413 of 1979 arises, had claimed a sum of Rs. 6,675 and the Tribunal has awarded only Rs. 1,155 as compensation. Though the learned counsel seeks to question the award, we are of the view that the award does not call for any interference. It has awarded only very minor amounts under other heads and a sum of Rs. 1,000 for 'pain and suffering'. Having regard to the nature of the injuries, and the treatment which the claimant had, the award of Rs. 1,155 cannot be said to be excessive at all. C.R.P. No. 2413 of 1979 is, therefore, dismissed. There will be no order as to costs in either of the C.M.As. or in the C.R.P.s or in the cross objections.

R.S. —— *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, O. C.J. and P. Venugopal, J.*

The Secretary, M/s. Spencer and Company Limited, Madras-2 ... *Appellant.*

v.

The Additional Commissioner for Workmen's Compensations-II at D.M.S. Compound, Teynampet, Madras-6 and another. ... *Respondents*

(A) *Tamil Nadu Shops and Establishments Act (XXXVI of 1947), section 41 (1)—Employee having cataract operation—Certificate from Opthalmologist that employee "will have great difficulty in doing normal clerical work"—Management terminating services of employee—Appeal by employee to Additional Commissioner for Workmen's Compensation—Termination order set aside—Writ petition by management dismissed—Appeal by management also dismissed.*

(B) *Constitution of India (1950), Article 226.*

An employee of "Spencer & Company", underwent a cataract operation in 1974. In 1976, the management referred him to the company's doctor who sent him to an opthalmologist. The Opthalmologist issued a certificate stating that the employee "will have great difficulty in doing normal clerical work". On the basis of the medical certificate, the management terminated the services of the employee. The employee filed an appeal to the Additional Commissioner for Workmen's Compensation who set aside the termination order. "Spencer and Company" filed a writ petition challenging the setting aside of the termination order and the petition was dismissed on the grouud that the termination order solely based on the medical certificate was unsustainable, On appeal by the management,

Held: Since the Opthalmologist had not issued a certificate that the employee cannot perform his duties on account of his poor eye-sight, even if there was difficulty in doing normal clerical work, yet the employee with all the difficulty and hardship may still carry on the work diligently and carefully. The Opthalmologist's certificate by itself, without any corroborative evidence as to how the poor eye-sight of the employee has adversely affected his working capacity to the detriment of the management, cannot constitute reasonable cause for purposes of section 41 (1) of the Tamil Nadu Shops and Establishments Act. [*Para.* 3.]

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice Sathiadev dated 28th September, 1981 and made in the exercise of the Special Original Jurisdictton of the High Court in Writ Petition No. 4763 of 1978 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the 1st respondent in T.S.F. Case No. 69 of 1976 and quash its order dated 7th August 1971 made in R.S.F. Case No. 69 of 1976.

S. Ramasubramaniam, for *King and Partridge,* for Appellant.

The order of the Court was made by

Gokulakrishnan O.C, J. Messrs. Spencer and Company Limited, is the appellant and the second respondent is their employee. He underwent a cataract operation in the year 1974, and after three month's rest reported to duty and was working in Reserve Stock Godown as a Clerk. In 1976 he was sent to the Bakery department and was preparing bills and maintaining stock registers etc. On 25th March, 1976 he was directed to report to the Company's Medical Officer for examination. The Company's Medical Officer referred him to an Opthalmologist who gave a certificate that the second respondent "will have great difficulty in doing normal clerical work". On the bassis of the certificate, the services of the second respondent came to be terminated. The employee (second respondent) filed an appeal to the first respondent under section 41 (2) of the Tamil Nadu Scope and Establishments Act, 1947 challenging the order of termination, and the order was set aside. Against this, the appellant filed a writ petition before this Court. The learned single Judge of this Court held that in the absence of evidence that the second respondent was not able to perform his duties due to his physical disability, the discharge solely based on the medical certificate is unsustainable, and the order passed

*W.A. No. 489 of 1981. 23*rd November,* 1981.

by the first respondent was accordingly confirmed. Against the order of the learned single Judge, the present writ appeal is filed.

2. The learned counsel for the appellant contended that as the eye sight of the second respondent became poor even after the cataract operation and he was unable to perform his duties diligently, and on a certificate issued by an Opthalmologist that the second respondent "will have great difficulty in doing normal clerical work", he was discharged from service by invoking section 41 (1) of the Tamil Nadu Shops and Establishments Act, and was paid one month's salary in lieu of notice. The learned counsel for the appellant further contended that discharge of the second respondent on the basis of the medical certificate constitutes reasonable cause within the meaning of section 41 (1), and there was no justification for the second respondent to move the first respondent for relief.

3. On 30th March, 1976 Dr. Guptha, Opthalmologist issued a medical certificate to the effect that the second respondent will have great difficulty in doing normal clerical work. It is significant to note that the Opthalmologist has not issued a certificate that the second respondent cannot perform his duties on account of his poor eye sight. Even if there was difficulty in doing the normal clerical work, yet, the second respondent with all the difficulty and handicap may still carry on the work diligently and carefully. It is for the Management to establish how the poor eye sight of the second respondent has impaired his normal work and efficiency and how, to continue him will be detrimental to the work. The need to establish such a thing becomes all the more greater when the second respondent within a month after his examination by Dr. Gupta, had gone to another Opthalmologist working in a Government hospital and has got a certificate that he is fit to carry on his clerical work with glasses. Unless the Management has established by evidence that the second respondent's difficulty in doing normal work is insurmountable and cannot be removed or rectified and that it has adversely affected his working capacity to the detriment of the management, the termination or order of discharge of the second respondent cannot be said to be for a reasonable cause. The Opthalmologist's certificate by itself, without any corroborative evidence as to how the poor eye sight of the second respondent has adversely affected his working capacity to the detriment of the Management, cannot constitute reasonable cause for purposes of section 41 (1) of the Act. The order of the learned single Judge confirming the order passed by the first respondent is fully justified. We, therefore, see no reason to entertain this writ appeal and it accordingly stands dismissed.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

Rakkayi Ammal ... *Petitioner**

v.

Murugaiyyan Pillai and others ... *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 72 (A)—Scope and applicability.

Rule 72 (A) of Order 21 of the Code of Civil Procedure, has been inserted by the Civil Procedure Code Amendment Act CIV of 1976, and has been designed for cases for purposes of Court-auction by a mortgagee of the property. He will have to obtain leave for purchase. The Court will fix the reserve price, while granting him leave, not less than the amount then due for the principal, interest aud costs in respect of the mortgage and when the property is sold in different lots, the Court will fix the reserve price as to fit the amount of decree. These are the agencies that have been introduced in the procedural law by the provisions of rule 72 (A), of Order 21, Civil Procedure Code. [*Para.* 4.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif, Nagapattinam, dated 30th August, 1980 and made in E. A. No. 473 of 1980 in O. S. No. 413 of 1974.

S. Rajagopalan, for Petitioner.

The Court made the following

ORDER:—This civil revision petition is filed by the plaintiff in O.S. No. 413 of 1974 under section 151, Code of Civil Procedure, against the order of the learned District Munsif, Nagapattinam, dated 30th August, 1980 in E. A. No. 473 of 1980. It is relevant in this connection to note that this application E. A. No. 473 of 1980 had been entertained by the lower court under Order 21, rule 72 (A) of the Code of Civil Procedure. The said rule reads as follows:—

"72-A (1) Notwithstanding anything contained in Rule 72, a mortgagee of immovable property shall not bid for or purchase property sold in execution of a decree on the mortgage unless the Court grants him leave to bid for or purchase the property.

(2) If leave to bid is granted to such mortgagee, then the Court shall fix a reserve price as regards the mortgagee, and unless the Court otherwise directs the reserve price shall be—

(*a*) not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot; and

(*b*) in the case of any property sold in lots, not less than such sum as shall appear to the Court to be properly attributable to each lot in relation to the amount then due for principal, interest and costs on the mortgage.

(3) In other respects, the provisions of sub-rules (2) and (3) of rule 72, shall apply in relation to purchase by the decree-holder under that rule."

2. It is seen from the records that on 29th April, 1980 in E. A. No. 144 of 1980 the reserve price was fixed at Rs. 20,000. It is also seen that, on that, the plaintiff did not bid. In the counter that was filed by the first defendant to this application E. A. No. 473 of 1980 in E. P. No. 133 of 1979, several contentions were raised including the contention to the following effect, namely, the land under reference would normally fetch more than Rs. 20 per kuli *i.e.* Rs. 60 per cent. and that the price quoted by the first defendant is the reasonable and moderate price prevailing in the village and that the land under reference is having assured irrigation and it is under double crop cultivation. It is further stated in the counter filed by the 1st defendant that it consists in single continuous block and the lands were capable of fetching more price. The plaintiff has wantonly brought the large extent of 4. 70 acres worth Rs. 18,000 for sale, is another contention that has been imbeded in the counter filed on behalf of the first respondent before the lower Court in E.A. No. 473 of 1980 in E. P. No. 133 of 1979. It is also contended that the plaintiff ought to have apportioned the lands in lots to realise her suit amount instead of bringing large extent of property for low price to cause inconvenience and difficulties to the first defendant. In the lower Court, R. 2 to R. 5 absented them-

*C.R.P.No. 2919 of 1980. *13th November, 1981*

selves and they were set *ex parte* in this application E.A. No. 473 of 1980 on 5th August, 1980. The petition was heard on 30th August, 1980 and it was disposed of on that date itself. It was observed by the lower Court in its order which is under revision that as per order in E.A. No. 144 of 1980, the decree-holder was permitted to bid at the auction and reserve price was also fixed at Rs. 20, 000 and so the plaintiff has no right to ask to reduce the reserve price according to her convenience.

3. The point in this civil revision petition is whether the order in E.A. No. 473 of 1980 in O.S. No. 413 of 1974 disposed of by the learned District Munsif, Nagapattinam, on 30th August, 1980 is liable to be revised on the basis that the trial Court has committed irregularity and illegality in its order and also exercised its jurisdiction in excess of what had been conferred on it. We have already extracted Rule 72 (A), Order 21 of Civil Procedure Code. It is common ground that permission had been granted to the plaintiff-petitioner herein to bid in the auction as per the provisions of rule 72 (A) (1), Civil Procedure Code. It is also common ground that as per the provisions of Order 21, rule 72 (A) (2), the reserve price as regards the mortgagee had been fixed at Rs. 20,000. The provision of sub-rules (2) and (3) of rule 72 of Order 21, Civil Procedure Code shall apply in relation to purchase by the decree-holder under that rule. Rule 72, sub-rules (2) and (3) read as follows:

> "72 (2): Where a decree-holder purchases with such permision the purchase money and the amount due on the decree may, subject to provisions of section 73, be set off against one another, and the Court executing the decree shall enter up, satisfaction of the decree in whole or in part accordingly.
>
> (3) Where a decree-holder purchases, by himself or through another person without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder".

In this connection, it is relevant to point out the upset price about which rule 199 (2) of the Civil Rules of Practice speaks. Rule 199 (8) of the said rules reads as follows:—

> "In cases in which the Court may consider that the appellant should not be allowed to bid for less than a sum to be fixed, it shall be competent to the Court to give leave to bid at the sale, only on condition that the appellant's bid shall not be less than the amount so fixed by the Court, which amount shall, as far as practicable be determined with reference to the probable market value of the property, or of the lot or lots into which the property is divided for sale."

4. This rule 72 (A) has been inserted by the Civil Procedure Code Amended Act CIV of 1976 and this rule has been designed for cases for purpose of Court auctionsale by mortgagee of the property. One will have to obtain leave for purchase. The Court will fix the reserve price while granting him leave, not less than the amount then due for principal, interest and costs in respect of the mortgage and when the property is sold in different lots, the Court will fix the reserve price as to fit to the amount of decree. These are the agencies that have been introduced in the procedural law of the land on the provisions of rule 72 (A), Order 21, Civil Procedure Code. As already stated, the point for consideration in this case is whether the lower Court had applied its mind with reference to the objectives that are imbedded in this Order 21, rule 72 (A), Civil Procedure Code, in disposing of this application or has it made its order revisable under section 151 Civil Procedure Code. In this view, when the entire order together with the materials on record is scrutinised, this Court finds that the lower Court had correctly come to the conclusion by following the procedure. In these circumstances, there is no infirmity or transgression of jurisdiction vested or failure to exercise the jurisdiction vested with the lower Appellate Court and as such, this Civil Revision Petition is liable to be dismissed and is hereby dismissed. But in the circumstances there will be no order as to costs.

R.S ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Arulandu Udayar and others ... *Appellants**

v.

S. P. Palaniappa Ambalam and others ... *Respondents.*

K. S. Soosai Udayar and another .. *Appellants*

v.

S. P. Palaniappa Ambalam and others ... *Respondents*

Iru Sowrimuthu Udayar .. *Appellant*

v.

S. P. Palaniappa Ambalam and others ... *Respondents.*

and

P. S. Sowrimuthu Udayar .. *Appellant*

v.

S. P. Palaniappa Ambalam and others .. *Respondents.*

Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), as amended by Act (XLIV of 1956), section 64 (c)—Scope and applicability—Applications for grant of pattas under sections 11 and 18 (4)—Matters to be decided by Settlement Officer—Finality of orders passed by him— Jurisdiction of civil Court how far excluded.

The decision as to the nature of the land in an estate notified and taken over by the Government under the Tamil Nadu Act XXVI of 1948 and the person entitled to patta under section 11 or a similar finding that it is ryoti land and not a private land and that a claimant was entitled to a ryotwari patta in proceedings under section 15 are final and not liable to be questioned in a civil Court. Therefore in a case where there is a claim by a person other than the land-holder for a ryotwari patta under section 11 and that claim is resisted by another who, in turn claims the right in himself, the decision given by the Settlement Officer is final and binding on the parties when the same dispute is to be decided in a civil Court. [*Para.* 10.]

Likewise, the order of the Settlement Officer relating to the grant of a miscellaneous patta under section 18 (4) of the Act in respect of buildings is final and binding as between the parties and not liable to be questioned. [*Para.* 11.]

Cases referred to:—

State of Madras v. *Karuppiah Ambalam*, 1958 L.W. 155: (1959) 1 M.L.J. 185; *State of Madras* v. *Ramalingaswamigal Madam*, (1969) 2 M.L.J. 281: (1969) I.L.R. 2 Mad. 742; *Adakalathammal* v. *Chinnayyan Paripundar*, (1959) 1 M.L.J. 314: 72 L.W. 358: A.I.R. 1959 Mad. 447; *Chenchulakshmamma* v. *Subrahmanya Reddy*, (1980) 3 S.C.C. 130: (1980) 1 S.C.R. 1006: A.I.R. 1980 S.C. 133; *Krishnaswami Thevar* v. *Perumal Konar*, (1961) 1 M.L.J. 168; *A. R. Sanjeevi Naicker* v. *P. M. Shanmugha Udayar*, (1965) 2 M.L.J. 204; *Miruddudа Chajanna* v. *Karnam Narayana*, (1979) 2 S.C.J. 425: (1979) 3 S.C.C. 42: A.I.R. 1979 S.C. 1320; *T. Munuswami Naidu* v. *R Venkata Reddi*, A.I.R. 1978 A.P. 200 (F.B.); *Cherukuru Muthayya* v. *Gadde Gopalakrishnayya*, A.I.R. 1974 A.P. 85 (F.B.); *Narayanaswami Vellalar* v. *V. Raangswamy Konar*, (1973) 86 L.W. 276; *Ratnasabapathi Servai* v. *Sannasi Ambalingavan*, (1966) 1 M.L.J. 190; *A. Shukur* v. *K. E. Sundara Mudaliar*, I.L.R. (1976) 1 Mad. 366; *Chinnappa Gounder* v. *S. Seshadri Iyengar*, (1980) I.L.R. 1 Mad. 477: A.I.R. 1981 Mad. 8; *Silambani Sri Chidambara Vinayagar Swami Devasthanam* v. *Duraiswami Nadar*, (1971) 2 M.L.J. 278; 84 L.W. 492: A.I.R. 1971 Mad. 474; *K. Vellappa Gounder and Sons* v. *K. S. Thirugnanasambandan Chettiar*, (1980) 93 L.W. 707: (1981) 1 M.L.J. 192: A.I.R. 1981 Mad. 100; *K. S. Soosai Udayar* v. *S. Andiappan Ambalam*, (1959) 1 M.L.J. 195: 1958 L.W. 857.

Appeals and Memorandum of Cross-Objections in S. A. Nos. 593 and 594 of 1977 against the decree of the District Court, Ramanathapuram at Madurai, dated 28th February, 1976 and passed in A. S. Nos. 304, 305 and 303, 306, 307 of 1963 respectively against the decree of the Court of the Subordinate Judge, Devakottai in O. S. Nos. 100, and 101 of 1951, 133 and 134 of 1952 respectively.

*S.A. Nos. 593 to 596 of 1977 and Cross-objections in S.A. Nos. 593 and 594 of 1977.

12th December, 1980.

S. V. Jayaraman and *V. Kannan*, for Appellants.

A. R. Lakshmanan, for Respondents.

The Court delivered the following

JUDGMENT.—Ariyakudi, Idaiyaur and Vettiur were three villages forming part of the Sivaganga Zamindari. Sometime after the settlement of the Zamindari in 1801, the Zamindar granted in inam certain lands in these villages as a post-settlement dharmilla inam in favour of one Sadhananda Mudaliar. Though the original grant in favour of Sadhananda Mudaliar is not produced, it is evident from the later records that the entirety of the lands comprised in the grant or a major portion of it, were un-reclaimed waste lands and it was given to the grantee for the purpose of reclamation. The conditions of the cowl are not available, but we can safely presume from the subsequent records that Sadhananda Mudaliar was conferred only a kudiwaram interest, in the lands and the melwaram was still vested with the Zamindar. Subsequently, these three villages were granted to certain brahmins and Ariyakudi Sri Thiruvengada Mudayan Devasthanam (hereinafter referred to as the 'Devasthanam') the 14th defendant in the suit. These three villages were later notified and taken over under The Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), which will hereafter be referred to as the 'Act', as under-tenure estate. The classification of these villages, as an under-tenure estate, was never in dispute. Since we have unimpeachable evidence that there was a grant of kudiwaram in favour of Sadhananda Mudaliar in respect of a portion of these villages, prior to the creation of the under-tenure estate, we have necessarily to take it that the grant in favour of the Devasthanam and the brahmins was not of both the warams or at least it did not cover both warams in respect of all the lands i the villages. Under Exhibit A-1 dated 5th December, 1874, the Devasthanam purchased the kudiwaram right of Sadhananda Mudaliar from the legal heirs of the said person. It, therefore, follows that in respect of the lands purchased under Exhibit A-1 the Devasthanam had become the owner of both the melwaram and the kudiwaram. The extent mentioned in Exhibit A-1 is 270 kurukkams, which is stated ot be approximately equivalent to 150 acres, though the boundaries given are for the entirety of the three villages. Obviously, the discription of the boundaries covered a larger extent because what is covered by Exhibit A-1 was only part of the three villages and not the whole of them. The description should be understood therefore as implying that the lands are situated within the major boundaries of villages mentioned in the document. But what is relevant for our purpose is that by virtue of the purchase of the kudiwaram under Exhibit A-1, the Devasthanam had become the owner of both the melwaram and kudiwaram in respect of 270 kurukkams, covered by that document.

2. For laying the Railway track, the Government acquired certain lands in those villages. In the dispute relating to the right of payment of the compensation money, the Land Acquisition Court *viz.*, the Sub-Court at Devakottai in O.P. Nos. 69 and 12 of 1932, 18, 30 to 33 and 35 of 1933 divided the lands acquired for purposes of determining the title in three groups after a discussion of the oral and documentary evidence available in which Exhibit A-1, filed in this case, was also filed as evidence. It was held that the Devathanam was the owner of both melwaram and kudiwaram in respect of the entirety of the lands covered under Exhibit A-1 and that therefore those lands, which are grouped under group numbers 1 and 2, which formed part of the properties covered by Exhbiit A-1, belonged to the Devasthanam absolutely. The Land Acquisition Court also gave a finding that the lands in Group No. 3 though situated in the under-tenure villages of Ariyakudi, Idaiyaur and Vettiyur, are not covered by Exhibit A-1 and that the lands belonged to a group of persons, including Udayars and Vallambars. It appears an appeal was filed against this order, but that was dismissed. Since the dispute did not end even thereafter, the parties seem to have entered into an agreement on 1st February, 1945, which is marked as Exhibit A-3 in this case. Since that document is questioned as one brought about in order to avoid the impending legislation of abolition of estates and since Udayars were not parties to that document it is not necessary for us to rely on Exhibit A-3. It may also add that the respondents did not rely on Exhibit A-3 for purposes of these cases, which are before me, and they relied only on Exhibit A-1

and it is therefore, not necessary to set out the details relating to Exhibit A-3. Both the Courts below have held that the present suit properties are portions of the lands purchased by the Devasthanam under Exhibit A-1, dated 5th December, 1974 and therefore we have also to proceed on the basis that they are part of such lands. The facts up to this stage are findings which could not be disputed by any of the parties in this case.

3. The three villages were notified and taken over by the Government under the Estates Abolition Act on 7th September, 1949. The four suits, from which these Second Appeals arise, were filed under Order 1, rule 8 of the Civil Procedure Code, by the eight karai Vallambars of the three under-tenure villages, for a declaration that they are entitled to the kudiwaram rights in the suit properties and for an injunction restraining the defendants from interfering with their possession and enjoyment or in the alternative for recovery of possession. Though the plaintiffs are the same in all the four suits, the defendants are different. The schedule to O. S. No. 100 of 1951 contained four items. The trial Court held that in respect of three items *viz.*, (1) T.S. Nos. 507; (2) 510 and 238; and (3) T.S. No. 491, the plaintiffs were entitled to the kudiwaram right and accordingly decreed the suit in respect of the same. He rejected the suit in respect of one other item measuring 6 acres. The defendants preferred an appeal in A.S. No. 304 of 1963 on the file of the District Court, Ramanathapuram against that portion of the decree, which held that the plaintiffs were entitled to the kudiwaram right and the plaintiffs filed cross-objections in respect of the 6 acres disallowed. Both the appeal and the cross-objections were dismissed by the learned District Judge. In O.S. No. 101 of 1951 the suit properties comprised of 5 items. The suit was decreed only in respect of item No. 3, *viz.*, T.S. No. 522 and dismissed in respect of other items. The plaintiffs and defendants 1 and 3 filed appeals in the District Court in A.S. Nos. 303 and 305 of 1963 respectively, questioning the judgment and decree in so far as they are against them. The learned District Judge, while confirming the decree of the trial Court and dismissing the defendants 'appeal, allowed a portion of the plaintiffs' appeal in respect of items 1 and 5, which covered T.S. Nos. 515 and 524. It is against this judgment the Second Appeal No. 594 of 1977 has been filed by the first defendant in the suit. There was only one item in each of the suits in O.S. Nos. 133 and 134 of 1952. The trial Court decreed the suit, as prayed for, and the appeal preferred by the defendants was dismissed. The first defendant has filed S.A. No. 595 of 1977 against O.S. No. 133 of 1952 and defendants 2 and 13 in O.S. No. 134 of 1952 have filed S.A. No. 526 of 1977.

4. Broadly stated the finding in the Land Acquisition Original Petitions would conclude a large portion of the dispute. As already stated, in those proceedings, the Devasthanam was held to be owning both the warams in respect of the lands covered by Exhibit A-1 in this case. The finding of both the Courts below also was that the suit properties are part of the land comprised in Exhibit A-1 document. The Devasthanam was, therefore, necessarily entitled to both kudiwaram and melwaram. However, in these proceedings, the Devasthanam had not claimed in itself the kudiwaram right. They supported the case of the plaintiffs that the plaintiffs are kudiwaramdars in respect of the suit lands. This in effect means that they have conferred the kudiwaram right, which was vested in them, on the plaintiffs. The only document, on which they could rely in respect of such vesting of the kudiwaram right on the plaintiffs, was only Exhibit A-3 which, as we have already stated, could not be relied on in these proceedings. The claim of the defendants that they are entitled to the kudiwaram rights was not based on any grant of such right by the Devasthanam. They have, therefore, necessarily to prove as to how they became entitled to the kudiwaram. Since the Devasthanam, who was the original owner, had conceded the claim of the plaintiffs, and since the defendants did not claim title to the kudiwaram through the Devasthanam and there being no other independent evidence to show as to how the defendants had acquiredt he kudiwaram right, the findings of the Courts below that in respect of those lands, for which a decree had been granted, normally have to be accepted.

5. However, the learned counsel appearing for the appellants, relying on certain proceedings taken under the Abolition Act, claimed that they were held entitled to the kudiwaram in respect of some of the properties which

were dealt with under the Act and those proceedings having become final, it is not open to the civil Court to go behind those orders and give any declaration in favour of the plaintiffs. During the settlement proceedings, some of these appellants filed petition before the Final Settlement Inquiry Tahsildar (General Enquiry, Karaikudi) for grant of a ryotwari patta under sections 11 (*a*), 18 (4) and 19 of the Act, impleading the plaintiffs herein and the Devasthanam as respondents. By an order, dated 15th December, 1959 the Settlement Tahsildar who is invested with the powers of Assistant Settlement Officer and competent to entertain applications under sections 11 (*a*), 18 (4) and 19 of the Act held that in respect of Survey No. 507/4, which is portion of Survey No. 507, item No. 1 of O.S. No. 100 of 1951, one Arulandu Udayar, the first defendant in the suit, was entitled to a miscellaneous patta under section 18 (4) of the Act. Similarly, certain defendants were granted ryotwari patta under section 11 (*a*) of the Act in respect of some other portions of the suit-lands. Relying on this order, the learned counsel appearing for the appellants, contended that it is a complete answer to the plaintiffs' claim of kudiwaram right, that it is not open to the civil Court to go behind this Order or question the correctness of the same, which has become final and that by colluding with the plaintiffs, Defendant No. 14 is not disputing the right of the plaintiff. If the plaintiffs and the Devasthànam, who were parties to these proceedings, were aggrieved by the order of the Settlement Tahsildar, they should have preferred appeals or revisions, as provided under the Act and that it is not open to them now to contend that either they are not final or they are open to question in these proceedings. In this connection, the learned counsel particularly relied on section 64-C of the Act, which reads as follows:

> "64-C (1) Any order passed by the Government or other authority under the Act in respect of matters to be determined for the purposes of this Act shall, subject only to any appeal or revision provided by or under this Act, be final.
>
> (2) No such order shall be liable to be questioned in any Court of Law".

Ith as, therefore, become necessary to decide the question as to what are the matters to be determined for the purposes of the Act, because only those orders in respect of the matters to be determined for the purposes of the Act are final and not liable to be questioned in a Court of Law. I may also clear one other aspect *viz*., that even treating section 64-C of the Act as not expressly or impliedly barring a suit, the orders coming under those provisions shall have to be treated as a complete answer if any dispute relating to the matters decided under those orders, arise in the suit. In order to understand as to what matters are made final under section 64-C of the Act, we have necessarily to refer to the scheme of the Act.

6. Under section 3 of the Act, with effect on and from the notified date, the entire estate (including all communal lands; porambokes; other non-ryoti lands; waste lands; pasture ...... lands; lanka lands; forests, mines and minerals; quarries; rivers and streams; tanks and irrigation works; fisheries and ferries), shall stand transferred to the Government and vest in them, free of all encumbrances and all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine. As seen from the long title to the enactment, the Act was intended to provide for the repeal of the permanent settlement, the acquisition of the rights of the landholders in permanently settled and certain other estates and the introduction of ryotwari settlement in such estates.

7. In order to effectuate a ryotwari settlement it is necessary to decide the nature of the land in the estate, which is vested in the Government and the rights of the persons who are in occupation of the lands. As part of the settlement proceedings, therefore, the competent authorities would have to decide as to whether a particular land is a ryoti land or a private land or whether the land is a tank or other poramboke or non-ryoti land, as also whether the lands are waste, lanka, forests, rivers or other lands. This classification is necessary not only for the purpose of finding out the rights of the person if any in occupation but also for adopting or fixing rates of assessment in respect of each category of land. The determination of the rights of the person in occupation is also necessary in order to

determine as to who the person is that is liable to pay the assessment in respect of the lands, which are subject to such assessment. While determining such nature of the land or the rights of the person in occupation, a dispute may arise either between the Government and the ryot, or between the Government and the landholder, or between the land-holder and the ryot or a triangular fight among all the three people. Such dispute may also relate either to the nature of the land alone or both with reference to the nature of the land as also to the right of the person who is in occupation, or a person claiming any right under the Act. Section 11 of the Act deals with the grant of ryotwari patta in respect of ryoti lands and sections 12, 13 and 14 of the Act deal with the grant of such patta in respect of private lands. The forum of determination, so far as private lands are concerned, is prescribed under section 15 of the Act, which authorises the Settlement Officer to examine the nature and history of the land in respect of which the landholder claim ryotwari patta under sections 12, 13 or 14 and provides for an appeal to the Tribunal against the order of the Settlement Officer. Though there is no such specific provision like section 15 of the Act with reference to the ryotwari patta, on an application by a ryot it is clear from the provisions of sections 3 (*d*) and 11 and the Rules published in exercise of the powers conferred by section 7, that the Assistant Settlement Officer is the competent authority to deal with an application under section 11 of the Act. The Act originally contained a provision in section 56, which enabled the settlement Officer to decide as to "who the lawful ryot in respect of any holding" is, but this provision was deleted in 1958 by Madras Act XXXVII of 1958.

8. In *State of Madras* v. *Karuppaiah Ambalam*[1], Justice Ramachandra Iyer (as he then was) observed:

> "Section 3 (*d*) proviso, implies that it was for the Settlement Officer to decide whether a ryot or landlord would be entitled to a patta. Section 15 directs the Settlement Officer to examine the nature and history of all lands in respect of which the landholder claims patta to decide as to or for what lands patta should be given to him. There is no provision for deciding the character of the lands which is claimed to be ryoti lands as it is evidently presumed that every cultivable land is ryoti land."

1. 1958 L.W. 155: (1959) 1 M.L.J. 185.

After stating this, the learned Judge proceeded to observe:

> "But section 3(*d*), proviso, would seem to contemplate a decision by the Settlement Officer as to whether a person in possession would be entitled to patta which would include a determination whether a land was ryoti land or not. Rules have been framed under section 67 of the Act to regulate the granting of pattas by a Government notification, dated 2nd March, 1955. Section 65 of the Act states that no suit or other proceeding shall lie against the Government for any act done or supposed to be done under this Act or any rule made thereunder. Where there is a dispute as to who the lawful ryot is in respect of a holding such dispute should be decided by the Settlement Officer under the provisions of section 56 of the Act. Any person deeming himself aggrieved by any decision of the Settlement Officer has got a right of appeal to the Tribunal."

As may be seen this decision and some other decisions which made similar observations are to the effect that it only enables a Settlement Officer to decide whether a person in possession would be entitled to a patta and not determination as to the nature of the land as such. The decision in *State of Madras* v. *Ramalingaswamigal Madam and others*[1], was a case which was decided with reference to the provisions subsequent to the repeal of section 56 of the Act. Even the provision in section 56 was construed by this Court in *State of Madras* v. *Karuppiah Ambalam*[2], which was approved by a Bench in *Adakalathammal and others* v. *Chinnayyan Panipundar and others*[3] as enabling the Settlement Officer to decide a dispute as to who the ryot entitled to obtain a ryotwari patta is and that it does not bar the civil Court's jurisdiction as to who is the owner of the kudivaram right in respect of the ryoti land and entertaining a suit for possession by a person who had been in possession and who had been dispossessed. It is on the basis of

1. (1969) 2 M.L.J. 281: (1969) I.L.R. 2 Mad 742.
2. (1959) 1 M.L.J. 185: 1958 L.W. 155.
3. (1959) 1 M.L.J. 314: 72 L.W. 358: A.I.R. 1959 Mad. 447.

the interpretation given with reference to section 56 as not ousting the jurisdiction of the civil Court that even after the repeal of section 56, it was held in *State of Madras* v. *Ramalinga swamigal Madam and others*[1], that the decision of the Settlement Officer under section 11 read with section 3 (*d*) and the rules, whether a land is a ryoti land or not is only for purposes of granting a ryotwari patta and that any decision as to the question of title by statutory authority is only an incidental matter which would not preclude a Civil Court independently enquiring into it in a properly instituted suit. In that view it was held further that section 64-C cannot be held to be a bar for a declaration of title and for an injunction. These decisions are no longer good law in view of the decision of the Supreme Court in *Chenchulakshmamma and another* v. *Subrahmanya Reddy*[2]. In that case also the Supreme Court considered the scope of sections 3 and 56 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 and as to the finality attached to the determination as to who is the lawful ryot. That was also a case where the suit was filed for a declaration of title of the plaintiff and for recovery of possession. The defendant con tended that the civil Courts could not take cognisance of the suit in view of the provisions of the Abolition Act, but this was overruled by the trial Court on the strength of the decision in *Krishnaswami Thevar.* v. *Perumal Konar*[3], wherein it was held that the Settlement Officer has no jurisdiction under the Act to adjudicate upon rival claims for grant of patta and that such disputes fell within the jurisdiction of the civil Courts. The appeal preferred against the decree was also dismissed. The High Court, in second appeal, observed that the only question requiring determination by it was whether the plaintiff who was admittedly the owner of the property lost his right by reason of the patta having been granted to defendant-I and answered the question by relying on *Krishnaswami Thevar* v. *Perumal Konar*[3] and *A R. Sanjeevi Naicker* v. *P. M. Shanmuga Udayar*[4], that it was competent for a civil Court to adjudicate upon the title of the parties notwithstanding the grant of a patta under the Act to one them. Before the Supreme Court the defendants relied on section 56 of the Act in support of their contention that the suit was barred and the civil Court could not adjudicate upon the title of the parties in view of the patta granted to the defendant No. 1. After quoting the section, the Supreme Court held:

"Sub-section (2) of the section categorically declares that decision of the Tribunal deciding the appeal shall be final and not liable to be questioned in any Court of law, in so far as it relates to any of the matters covered by sub-section (1). It goes without saying that if no appeal is filed, a similar finality shall attach to the decision of the Settlement Officer. One of such matters is covered by clause (*c*) of sub-section (1) and embraces the determination of the question as to who the lawful ryo tin respect of any holding is. Questions which a Settlement Officer may be called upon to decide under the said clause (*c*) would certainly include such as may have resulted from a dispute between two or more persons as to who of them is the lawful ryot; and once a dispute of that type has been adjudicated upon by the Settlement Officer, his decision becomes final unless an appeal is filed before the Tribunal, in which event it is the decision of the Tribunal to which finality attaches. In either case the decision is not liable to be called into question in any Court of law. We need not go into further details on the question of interpretation of section 56 of the Madras Act inasmuch as our view is fully supported by another decision of this Court in *Muddada Chayanna* v. *Karnam Narayana*[1]. In that case Chinnappa Reddy, J., who delivered the judgment of the Court was concerned with the interpretation to be placed on section 56 of the Andhra Act which repeats word for the contents of section 56 of the Madras Act. In holding that the authorities mentioned in subsection (2) of section 56 of the Andhra Act had exclusive jurisdication to decide a dispute between rival claimants for a ryotwari patta, this Court approved the decision in

1. (1969) 2 M.L.J. 281.
2. (1980) 3 S.C.C. 130: (1980) 1 S.C.R. 1006: A.I.R. 1980 S.C. 133.
3. (1961) 1 M.L.J. 168.
4. (1965) 2 M.L.J. 204.

1. (1979) 2 S.C.J. 425: (1979) 3 S.C.C. 42; A.I.R. 1979 S.C. 1320.

T. Munuswami Naidu (died) v. *R. Venkata Reddi*[1] in which the same interpretation had been given to section 57 of Andhra Act as a result of an elaborate discussion. This Court further held that *Cherukuru Muthayya* v. *Gadde Gopalakrishnayya*[2], which was also decided by a Full Bench but had been overruled by a larger Full Bench in *Munuswami case*[1] had been wrongly decided."

In view of this decision of the Supreme Court, the reasoning of the Bench in *State of Madras* v. *Ramalingaswamigal Madam and others*[3] and the decisions cited therein are no longer available and that therefore, it has to be held that there was a machinery to decide the character of the land *viz*., whether it is ryoti and also as to whether a particular person in occupation is entitled to a ryotwari patta as against the claims made by others and that any decision rendered by such competent authority on any of the issues to be decided, was final and binding on the parties and not liable to be questioned in any Court of law.

9. Section 56 was repealed by Madras Act XXXIV of 1958 and section 64-C was inserted by Madras Act XLIV of 1956. Whether the repeal of section 56 has taken away the jurisdiction of the Settlement Officer to determine the nature of the land and as to who is entitled to a ryotwari patta is the next question that arises for consideration. None of the decisions relied on section 56 as the provision that enables the Settlement Officer to determine the nature of the land. That is found in section 3 (*d*) read with section 1 and the rules framed under section 67 of the Act. We have already seen that some decided cases went into the question as to whether a dispute between two or more persons as to who of them is the lawful ryot is comprehended within section 56 and whether the decision by a Settlement Officer on that question is final and cannot be called in question in any Court of law, and it was held that such dispute was comprehended but it was not finally decided and the civil Court's jurisdiction is not taken away but these decisions in so far as they held

1. A.I.R. 1978 A.P. 200 (F.B.).
2. A.I.R. 1974 A.P. 35 (F.B.).
3. (1969) 2 M.L.J. 281: (1969) I.L.R. 2 Mad. 742.

that the finding is not final and the civil Court's jurisdiction is not taken away are no longer good law in view of the Supreme Court judgment cited above. We have also noticed that the ryotwari settlement implies a decision or determination both on the question of nature of the land and the person who is entitled to ryotwari patta. Even without section 56 therefore, jurisdiction is vested in the Settlement Officer to decide a dispute between two or more persons as to who, of them is the lawful ryot. The original Act did not contain a provision similar to section 64-C. After it was inserted by the Amending Act in 1956, the decision of the Settlement Officer which is certainly for purposes of the Act was made final and not liable to be questioned in any Court of law. Section 11, the proviso to section 3 (*d*) and the rules published in exercise of the powers conferred by section 7, read in the light of the decision of the Supreme Court in *Chenchulakshmamma and another* v. *Subramanya Reddy*[1], clearly shows that the Act has constituted the Settlement Officer as the competent authority to examine the nature of the lands and as to who is the person entitled to the ryotwari patta, and the decisions which have held that there is no machinery for the purpose of deciding the dispute between rival claimants for the issue of ryotwari patta under section 11 are, therefore, no longer good law.

10. The same result could be reached also on a different ground. So far as the decisions under section 15 are concerned, this Court has been taking a consistent view that in view of the finality attached to the order of the Tribunal and in particular, in view of the provisions of section 15 (2) (*b*), there was exclusion of jurisdiction of the civil Courts in the matter of both decisions as to the nature of the land as also the person who would be entitled to a ryotwari patta. The disputes which will be comprehended under section 15 of the Act may be grouped under two categories. Firstly, the landholder may claim the land as his private land but the Government is contending that it is not a private land and that it is either poromboke or other non-ryoti land and, therefore, the landholder is not entitled to a ryotwari patta. Secondly,

1. (1980) 1 S.C.R. 1006: (1980) 3 S.C.C. 130.

the dispute, may be with reference to cultivable land in an estate and the landholder might claim that land as his private land, but a ryot may dispute his claim and contend that it is a ryoti land which was included in his holding and, therefore, he was entitled to ryotwari patta. Though the claim of the ryot in such a case is one that may fall under section 11, since the landholder also claims the same land as his private land, the claim or application of the landholder will have to be dealt with only under section 15. Therefore, in a case where the dispute is between the landholder and the ryot necessarily the matter will have to be decided under section 15 though on a finding that the landholder had failed to establish that it is his private land the ryot will be given patta under section 11. In the decision reported in *Narayanaswami Vellalar* v. *V. Rangaswamy Konar and others*[1], Ismail, J. (as he then was), considered the finality attached to the orders made under section 15 and the bar of civil Court's jurisdiction with reference to the provisions under section 15. After quoting the provisions of sections 15, 64-A and 64-C, the learned Judge observed:

> "Simply as a matter of construction, without any reference to any decided cases, it will follow that section 15 (1) of the Act vests exclusive jurisdiction in the Settlement Officer to examine the nature and history of all lands in respect of which the landholder claims ryotwari patta under sections 12, 13 or 14, as the case may be and to decide in respect of which lands the claim should be allowed. The jurisdiction of the Tribunal on appeal will be co-extensive with that of the Settlement Officer under section 15 (1) and therefore the Tribunal also has got identical jurisdiction to examine the nature and history of all the lands in respect of which the landholder claims ryotwari patta and to decide in respect of which lands the claim should be allowed. Then comes the crucial provision, namely, clause (*b*) of sub-section (2) of section 15. It provides in express and unambiguous language that the decision of the Tribunal on any such appeal shall be final and not be liable to be questioned in any Court of law. When the section refers to the decision of the Tribunal, that must be correlated to the obligation and the jurisdiction of the Tribunal or the Settlement Officer, as contemplated by section 15 (1), namely, to examine the nature and history of all lands in respect of which the landholder claims ryotwari patta and to decide in respect of which lands his claims should be allowed. Therefore the decision rendered by the Settlement Officer and the Tribunal, as a result of the examination of the nature and history of the land as to its character and the decision as to in respect of which land, the landholder will be entitled to a patta, are all matters entrusted to the exclusive jurisdiction of the Settlement Officer and the Tribunal. The decision contemplated in section 15 (2) (*b*) of the Act refers to the determination of these questions entrusted to its exclusive jurisdiction and such determination has been rendered final in specific and unqualified terms by that section. The language of section 15 (2) (*b*) as it stands is absolute and unqualified and does not admit of any exception or qualification."

This reasoning of the learned Judge is equally applicable to a decision by a Settlement Officer under section 11 read with section 3 (*d*) and the rules. There is also no reason to restrict the finality under section 15 (2) in respect of one finding namely, that it is a private land or not and that the landholder is or is not entitled to a patta and not to the finding that it is a ryoti land or in respect of which somebody who claimed patta was entitled to a ryotwari patta. It is useful again to recall the provisions of the Act as they stood originally and the subsequent amendments. Corresponding to section 15 (2) (*b*) there was a provision limited for ryoti lands alone in section 56 (2). Sections 64-A and 64-C were not there. With respect to a decision under section 15, the finality was provided in section 15 (2) (*b*) itself. With reference to a decision as to who the lawful ryot is, finality was attached under section 56 (2). In view of these provisions, there was no necessity for a provision like section 64-C. If the Act had come up for construction as it was originally enacted the same reasoning as has been mentioned

1. (1972) 86 L.W. 276.

in the decision in *Narayanaswami Velalar* v. *V. Rangaswamy*[1], would have been available also in respect of ryoti lands and there was no necessity to rely on section 56 for that purpose. Section 56 was repealed and section 64-C was inserted by subsequent amendments. While the original scheme of the Act provided for the finality attached to the orders and their non-liability to be questioned in civil Courts, in their respective places the legislature by inserting section 64-C had compendiously provided for a finality in respect of every order that is made under the Act in respect of matters to be determined for the purpose of the Act. So construed, even in respect of orders made under section 11, the finality under section 64-C will attach. In fact the learned Judge in *Narayanaswami Velalar* v. *Rangaswami Konar and others*[1], considered the scope of section 64-C also with reference to the language used in sections 15 (2) (*b*) and 64-C and observed:

> "Section 64-C (1) refers to 'matters to be determined for the purpose of this Act' whilst no such limiting expression occurs in section 15 (2) (*b*) of the Act. Assuming that even in the absence of such a limiting expression section 15 (2) (*b*) has to be construed as only having an application to matters to be determined for the purpose of the Act, I am unable to see what expression in section 15 (2) (*b*) has to be construed as only having an application to matters to be determined for the purpose of the Act, *I am unable to see what exactly is the purpose of the Act, apart from the determination of the character of land and pieces and parcels of lands to which a landholder is entitled to a ryotwari patta.* The contention of Mr. Vedantachari is that section 22 of the Act provides for settlement, just like in the case of a ryotwari area, and it is for purpose of effecting that settlement, the decision contemplated by section 15 has to be arrived at incidentally and therefore the determination as to the character of land cannot be said to be for the purpose of the Act and consequently it cannot be said to be final. I am unable to see any substance in this argument. Ryotwari settlement has nothing whatever to do with the character of the land as private or ryoti. On the other hand, it has got everything to do with the classification of the soil with reference to the rate of assessment that may be provided for different classes of lands having regard to their nature, as wet, dry or manavari, and having regard to the irrigation facilities available. But the question whether a land is a private land or a ryoti land has absolutely no relevancy whatever for effecting a ryotwari settlement and for the purpose of imposing the rate of assessment depending upon the classification or *tharam* of the soil. *Therefore, I am unable to agree with the learned counsel that the determination whether a land is private or ryoti is only incidental to effecting a ryotwari settlement and in itself is not the determination of a question entrusted to the exclusive jurisdiction of the authorities concerned.* An extension of this argument is that the exclusive jurisdiction of the Settlement Officer and that of the Tribunal under section 15 is merely to grant a ryotwari patta. As a matter of fact, an examination of the provisions of the Act will show that there is not a single section dealing with the grant of *ryotwari patta.* All that the provisions of the Act deal with is the entitlement to a ryotwari patta, and its determination *The grant of ryotwari patta being merely a consequential act following the determination of the right of the person to obtain a patta in respect of particular lands, it is more or less in the nature of a decree following a judgment and the decision that is contemplated by section 15 is the judgment* and not the decree which must necessarily follow and flow from the determination as to the entitlement of the landholder to a ryotwari patta in respect of particular lands. Therefore, the scope and ambit of section 15 of the Act makes it absolutely and abundantly clear that the jurisdiction conferred on the Settlement Officer and the Tribunal is for the purpose of ascertaining and determining the nature and history of the land and for determining the entitlement of the landholder to a ryotwari patta in respect of such land and the grant of ryotwari patta as such is totally outside the scope of that section that being a mechanical action not involving determination of any question

1. (1973) 86 L.W. 276.

The determination itself has been provided for only under section 15. Therefore, I am unable to agree with the contention of the learned counsel that the finality contemplated by section 15 (2) (*b*) is only for the purpose of the Act in the sense that it is only for the purpose of granting a ryotwari patta and not for determining the character of the land as such."

(Italics is mine)

I am in entire agreement with these reasonings and conclusion of the learned Judge. I am also of opinion that the same reasonings are equally applicable to a case of determination under section 11 and even in respect of such determination, the finality provided under section 64-C would attach. Since the learned Judge has considered all the earlier decisions in *Narayanaswami Velalar* v. *V. Rangaswamy Konar and others*[1] it is not necessary for me to refer to those decisions which have taken a similar view with respect to the provisions of section 15 (2) (*b*). The three decisions which are not referred but which have taken a similar view, are one reported in *Ratnasabapathy Servai* v. *Sannasi Ambalagaran*[2] and the decisions of Varadarajan, J., in *P.A. Shukur* v. *K.S. Sundara Mudaliar and another*[3] and *Chinnappa Gounder &others* v. *S. Seshadri Iyengar and another*[4]. It necessarily follows that the decision as to the nature of the land and the person entitled to patta under section 11 or a similar finding that it is ryoti land and not a private land and that a claimant was entitled to a ryotwari patta in proceedings under section 15 are final and not liable to be questioned in a civil Court. Therefore, in a case whether there is a claim by a person other than the landholder for a ryotwari patta under section 11 and that claim is resisted by another who, in turn claims the right in himself, the decision given by the Settlement Officer is final and binding on the parties when the same dispute is to be decided in a civil Court.

11. The next question that has to be determined is with reference to the claim made under section 18 (4). Section 18 deals with the vesting of buildings situated in estates. After dealing with certain buildings which originally belonged to the erstwhile landholder, sub-section (4) provided that every building other than a building referred to in sub-sections (1), (2) and (3) thereof shall, with effect from the notified date, vest in the person who owned it immediately before that date, and "building" is defined in sub-section (5) of that section as including the site on which it stands and any adjacent premises occupied as an appurtenance thereto. A Division Bench of this Court in *Silambani Sri Chidambara Vinayagar Swami Devasthanam through its trustees ST. MR. VR. Murugappa Chettiar and others* v. *Duraisami Nadar and others*[1] construing the provisions of section 18 (4) held that in order to enable a person to claim that the building is vested in him under section 18 (4), it is necessary that there is a canlescence of the ownership of the building as well as of the site on which it stands. In another Division Bench judgment in *K. Vellappa Gounder and Sons by partner K. Vellappa Gounder and others* v. *K.S. Thirugnanasambandam Chettiar and others*[2] to which I was a party, applying the principles in *Silambani Sri Chidambara Vinayagar Swami Devasthanam through its trustees*[1] *ST. MR. VR. Murugappa Chettiar and others* v. *Duraisami Nadar and others*[1] to a case arising under Madras Act XXX of 1963, it has been held that in a case where there is no coalescence of such interest and the persons who claimed the patta only was able to prove that he is the owner of the building, the land shall be deemed to have vested in the Government and that, therefore, the landholder will not be entitled to get a ryotwari patta in respect of that land. It was further held that only those persons who were owning the buildings that could apply to the Government for the grant of ground rent patta outside the provisions of the Act. Sub-section (6) provides that if any question arises whether any building or land falls or does not fall within the scope of sub-sections (1) (2) (3) (4) or (5) of section 18, it shall be referred to the Government whose decision shall be final and not liable to be questioned in any Court of law. The Government have delegated this power to the Assistant Settlement Officers. It may be seen, as noted in an earlier part of this judgment, that sub-section (6) of section 18 was there even in the original Act that is, before the insertion of

1. (1973) 86 L.W. 276.
2. (1956) 1 M.L.J. 190.
3. (1976) I.L.R. 1 Mad. 366.
4. (1980) I.L.R. 1 Mad. 477: A.I.R. 1981 Mad. 8.

1. (1971) 2 M.L.J. 278: 84 L.W. 492: A.I.R. 1971 Mad. 474.
2. (1980) 93 L.W. 707:(1981) 1 M.L.J. 192: A.I.R. 1981 Mad. 100.

section 64-C and it is in those circumstances, the finality attached to that order is mentioned in the section itself. Even if that section had not mentioned about the finality, section 64-C would have covered a decision given under sub-section (6). In the result, therefore, the order of the Settlement Officer in Exhibit B-23 in so far as it related to the grant of miscellaneous patta under section 18 (4) and a ryotwari patta under section 11 (*a*) is final and binding between the parties and not liable to the questioned in these proceedings. In fact, when on an earlier occasion the matter came to this Court on a preliminary issue, Justice Ramachandra Iyer (as he then was), in the decision reported in *K.S. Soosai Udayar and another* v. *S. Andiyappan Ambalam and others*[1] dismissed the appeal with the following observations:

> "It may be that during the course of the suit if the defendant is able to obtain patta from the authorities he can produce that patta as an answer to the plaintiff's claim that he has got superior title against whom a decree for possession cannot be granted."

Accordingly, the second appeals are allowed in so far as they relate to that portion of the building and site which is comprised in T. S. No. 507/4 in respect of which S. Arulandu Udayar was given a ryotwari patta under Exhibit B-23 as also in respect of T.S. Nos. 510 and 522/3 for which section 11 (*a*) patta was granted in favour of Arulandu Udayar. In other respects, the second appeals are dismissed.

12. The plaintiffs have filed cross-objections in Second Appeals Nos. 593 and 594 of 1977. The cross-objection in Second Appeal No. 593 of 1977 related to six acres of land in respect of which the trial Court dismissed the suit and the appeal filed by the plaintiff was also dismissed. But instead of filing a second appeal, the plaintiffs have chosen to file a cross-objection. The cross-objection itself is not maintainable as A. S. No. 304 of 1963 filed by the plaintiffs had been dismissed in respect of this land and, therefore, the plaintiffs should have filed a regular appeal. Apart from this, the findings of the Courts below are that these six acres have not been shown to be covered by Exhibit A-1. That is a finding of fact. As already stated, except with reference to those lands which are covered by Exhibit A-1, the Devasthanam has not so far proved to be the owner of both warams. Accordingly the cross objection filed in Second Appeal No. 593 of 1977 is dismissed.

13. The plaintiffs have also filed a cross-objection in Second Appeal No. 594 of 1977 in respect of items 2 and 4 *viz.*, T.S. Nos. 521 and 523. In respect of these items also the trial Court dismissed the suit, and the appeal filed by the plaintiffs was also dismissed. But without filing a regular second appeal, this cross-objection has been filed. The same reasons which are mentioned for dismissing the cross-objection filed in Second Appeal No. 593 of 1977 are applicable to those two items as well. Accordingly the cross objection filed in Second Appeal No. 594 of 1977 is also dismissed. In the circumstances of this case, the parties will bear their respective costs both in the second appeals and in the cross-objections.

R.S. —— *Appeal partly allowed.*

1. (1959) 1 M.L.J 195; (1958) L.W. 857.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

K. Mara Naickan ... *Petitioner**

v.

R.S. Saradhambal ... *Respondent.*

(A) *Provincial Insolvency Act (V of 1920), section 6—Mere delaying payment to creditor not* per se *an act of insolvency.*

(B) *Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (X of 1975)—Agriculturist debtor—Moratorium period as such no bar for maintaining an insolvency petition—Policy of the legislation however is to preclude passing of order on such petition—Agriculturist debtor retaining property and wishing to apply income to pay creditors, though a process involving delay, is outside section 6 (1) of the Insolvency Act.*

Under the scheme of the Provincial Insolvency Act, a creditor can only petition for adjudicating his debtor an insolvent by alleging an act of insolvency occurring within three months before the presentation of the petition. Section 6 lists out out in clauses (*a*) to (*h*), what are acts of insolvency. In the present case the act of insolvency alleged against the debtor was stated to fall under clause (*b*) which lays down that a debtor commits an act of insolvency if he makes a transfer of his property or any part thereof with intent to defeat or delay his creditors. Section 9 sets out the circumstances under which a creditor may file an insolvency petition. Section 13 (2) enacts what are the particulars which a creditor should set forth in his insolvency petition. Section 24 lays down the procedure at the hearing of an insolvency petition. Section 27 provides when and in what circumstances the order of adjudication should be passed by the Courts. Section 25 (1) enacts when and in what circumstances the insolvency petition must be dismissed by the Court. For instance, the Court must dismiss a creditor's insolvency petition if the proof adduced by the creditor on the act of insolvency alleged by him against the debtor is not regarded by the Court as a satisfactory proof. Again the Court must dismiss the creditor's insolvency petition if in its opinion there is sufficient cause which warrants that there should be no order of adjudication against a debtor. [*Para.* 3.]

Although Act X of 1975 only imposes a bar against the filing of a suit or execution petition for the period of the moratorium covered by the Act and it does not prohibit the creditor maintaining an insolvency petition against an agriculturist, yet, the legislative policy behind this Act is that it does, provide a compelling ground for not allowing insolvency proceedings to be directed against the debtor in question. [*Para.* 5.]

The clear legislative intention and the policy expressed by the preamble to the Act is to protect agriculturists who had incurred debts from the distractions and pressures of creditors so as to enable them to rehabilitate themselves. While the operative provisions of Act X of 1975 are limited to a stay or bar of suits alone, yet, the high mind and purpose of this legislation cannot be thrown to the winds by the Insolvency Court while disposing of a petition for adjudication of the debtor as insolvent. It would not be sensible to protect a debtor from being sued on his debt, while at the same time exposing him to proceedings by his creditors under the law of insolvency. The Sub-Court in this case had given express thought to the effect that the petitioning creditor had approached the Insolvency Court for putting pressure on the debtor, finding that institution of a suit to recover the debt had been blocked by Act X of 1975. The debtor had characterised the strategy of the petitioning creditor as an abuse of the process of Court. While it is not necessary to say that the action of the creditor involves a misuse of Court process or is a fraud on Act X of 1975, the present position of the parties under Act X of 1975, by itself provides ample and sufficient cause on the basis of which the Insolvency Court should have come to the conclusion that no order can be made on the creditor's petition adjudicating the debtor as an insolvent. [*Para.* 6.]

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*C.R.P. No. 2?3 of 1979. *26th June, 1981.*

If the debtor were to say that he would not sell his properties, but he would utilise the income from the properties to repay his debt, that cannot be regarded as an intention to delay the creditors. There is no law which compels a debtor to sell his assets to pay his debts excepting the law relating to execution of money decrees. Therefore where a debtor announces that it is his intention to hold his property intact, but to utilise the income therefrom to pay off his creditors, that cannot be regarded as delaying the creditors. In any case, that cannot fall under section 6 of the Provincial Insolvency Act. For mere delaying in the payment to the creditors is not *per se* an act of insolvency. Section 6 (*b*) lays down that the sale of the debtor's property must be with intent to delay the creditors. The act of sale of itself is the method by which the debtor carries out his intention to delay the creditor. Where a debtor does not want to dispose of his properties, but wishes to retain them, earn income therefrom and then pay the creditors, the process may, according to circumstances, involve delay in payment of the creditors. But that would not bring the case under section 6 (*b*) of the Act. [*Para.* 10.]

Cases referred to:—

Pratanmall Rameshwar v. *Chunilal Jahuri*, (1933) I.L.R. 60 Cal. 345; *Chidambaram Chettiar* v. *Daivanai Achi*, (1936) 43 L.W. 516; 61 I.C. 348: (1935) M.W.N. 1159: A.I.R. 1936 Mad. 275; *Chinnappa Reddy* v. *Venkobayya*, (1938) 47 L.W. 772: (1938) M.W.N. 283: 177 I.C. 627: A.I.R. 1938 Mad. 489.

Petition under section 75 of the Provincial Insolvency Act V of 1920 and read with section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court, Coimbatore dated 21st March, 1978 and made in C.M.A. No. 42 of 1977 (I.P. No. 28 of 1975. Subordinate Judge of Erode).

P. Sukumar and *Mrs. Mohana S. Nair*, for Petitioner.

S. Sitarama Iyer, *S. Rajarama Iyer* and *S. Sitaraman*, for Respondents.

The Court delivered the following

JUDGMENT:- In this revision under the Provincial Insolvency Act, 1920 from the appellate order of the District Court, the question is whether an order of adjudication passed against a debtor is valid? The act of insolvency alleged by the petitioning creditor against the debtor was that within there months of the presentation of the insolvency petition, the debtor has alienated the most valuable property of his to a third party. The debt due to the petitioning creditor was under a promissory note, It was for Rs. 5,350/-. The debtor had realised Rs. 33,000/- from the sale of some of his properties, and yet from out of the proceeds, he did not pay anything. towards the discharge of the debts. It was alleged by the petitioning creditor that the sale by the debtor of his properties was with intent to defeat and delay his creditors. The debtor denied this act of insolvency. He asserted that the sale effected by him was *bona fide*. He said that out of the proceeds of sale, he had discharged certain debts to an extent of Rs. 8,000 and the balance was utilised for conducting the marriage of his two sons, for seers or presents to his daughter and for digging a well. The debtor also submitted that even after the sale of the properties, he retained with him a considerable extent of immovable properties including an extent of 5 acres of nanja land worth at least Rs. 1,00,000. In these circumstances, the debtor denied there was any intention on his part to defeat or delay his creditors by the mere act of selling some of his properties. He also submitted that the insolvency petition against him was *mala fide* and was intended to circumvent the provisions of the Tamil Nadu Act X of 1975, which imposes a bar on the petitioning creditor from realising her debt for the period of the moratorium laid down under that Act.

2. Both the Sub-Court in the first instance and the District Court in Appeal, held that the sale by the debtor of his properties was without making any provision for the petitioning creditors and it amounted to an act of insolvency. They accepted the position that even after the sale, the debtor had with him considerable properties. Both the Courts, however, dismissed the continued existence of other

items of immovable property of the debtor as irrelevant to the discussion, expressing the view that a debtor could successfully resist an order of adjudication on the creditor's petition only if he could satisfy the Court that he is able to pay his debts and not by showing that he was possessed of immovable property. The Sub Court found that there was no evidence to show that the debtor had applied the sale proceeds of Rs. 33,000/- either for payment of some of his creditors or performing the marriage of his sons or for giving presents to his daughter or for digging a well. Both the Sub-Court and the District Court accepted the position that by reason of Act X of 1975, the petitioning creditor would have been barred from filing a suit against the debtor for realisation of the amount. They, however, held that Act X of 1975 cannot be a bar to the insolvency petition. The Sub-Court further observed that although the filing of the petition was to circumvent the bar imposed by Act X of 1975, still it cannot be an answer to an order of adjudication passed on the act of insolvency alleged by the petitioning creditor in this case.

3. The order of adjudication, supported by the reasons aforesaid, is now being challenged in this revision by the debtor. Under the scheme of the Provincial Insolvency Act, a creditor can only petition for adjudicating his debtor an insolvent by alleging the act of insolvency occurring within three months before the presentation of the petition. Section 6 lists out in clauses (*a*) to (*h*), what are acts of insolvency. In this case, the act of insolvency alleged against the debtor was stated to fall under clause (*b*) which lays down that a debtor commits an act of insolvency if he makes a transfer of his property or any part thereof with intent to defeat or delay his creditors. Section 9 sets out the circumstances under which a creditor may file an insolvency petition. Section 13 (2) enacts what are the particulars which a creditor should set forth in his insolvency petition. Section 24 lays down the procedure at the hearing of an insolvency petition. Section 27 provides when and in what circumstances the order of adjudication can be passed by the Court. Section 25 (1) enacts when and in what circumstances the insolvency petition must be dismissed by the Court. For instance, the Court must dismiss a creditor's insolvency petition if the proof adduced by the creditor of the act of insolvency alleged by him against the debtor is not regarded by the Court as satisfactory proof. Again, the Court must dismiss the creditor's insolvency petition if, in its opinion there is sufficient cause which warrants that there should be no order of adjudication against a debtor.

4. It was the endeavour of Mrs. Mohana S. Nair that there was sufficient cause in this case which warranted the Courts below in dismissing the insolvency petition. According to her, sufficient cause was provided by the fact that at the material time the petitioning creditor was barred from proceeding to recover the debt from the debtor by reason of the moratorium in Act X of 1975 and that was the reason why the petitioning creditor had taken resort to file the insolvency proceeding against the debtor both as a means of circumventing the provisions of Act X of 1975 and as a pressure tactic to reduce the debtor to submission. Learned counsel conceded that Act X of 1975 did not, in terms, bar an insolvency petition against an agriculturist who was a debtor. But the fact that the debtor was protected by the moratorium under this Act should have been held to be a sufficient cause within the meaning of section 25 (1) of the Provincial Insolvency Act and the creditor's petition in this case ought to have been dismissed on that ground.

5. There is ensiderable force in this contention and in the way it was urged by learned counsel. Although Act X of 1975 only imposes a bar against the filing of a suit or execution petition for the period of the moratorium covered by the Act and it does not prohibit the creditor from maintaining an insolvency petition against an agriculturist, yet, in my judgment, the legislative policy behind this Act is that it does provide a compelling ground for not allowing insolvency proceedings to be directed against the debtor in question. The preamble to Act X of 1975, to the extent material, reads as follows:—

"Whereas there has been widespread drought; And whereas the agriculturists have borrowed debts and may, if freed for a time from the pressure of creditors, be

enabled to rehabilitate themselves. And whereas it is in the interests of the general public that, at the present time, agriculturists be spared the distractions and expenditure involved in litigation launched by their creditors, in order that the maximum possible advantage may result to the State in the matter of production of food crops."

6. The clear legislative intention and policy expressed by this preamble is to protect agriculturists who had incurred debts from the distractions and pressures of creditors so as enable them to rehabilitate themselves. While the operative provisions of Act X of 1975 are limited to stay or bar of suits alone, yet, in my judgment, the high mind and purpose of this legislation cannot be thrown to the winds by the insolvency Court while disposing of a petition for adjudication of the debtor as insolvent. It would not be sensible to protect a debtor from being sued on his debt. while at the same time exposing him to proceedings by his creditors under the law of insolvency, The Sub-Court in this case had given express thought to the effect that the petitioning creditor had approached the Insolvency Court for putting pressure on the debtor, finding that an institution of a suit to recover the debt had been blocked by Act X of 1975. The debtor had, characterised the strategy of the petitioning creditor as an abuse of the process of Court. While it is not necessary to say that the action of the creditor involves a misuse of Court process or is a fraud on Act X of 1975, I should think that the present position of the parties under Act X of 1975 by itself provides ample and sufficient cause on the basis of which the Insolvency Court should have come to the conclusion that no order be made on the creditor's petition adjudicating the debtor as an insolvent.

7. Even otherwise, on the evidence which both the Sub Court and the District Court had before them, I do not think there was any warrant for their decision that the sale by the debtor of some of his properties was with intent to defeat or delay his creditors. The Sub Court had analysed the evidence on record, particularly that of the debtor himself. In the course of discussing the evidence, the the Sub Court rejected the assertions of the debtor that he had appropriated Rs. 33,000 which he obtained on the sale of his properties, for payment to his creditors, meeting the marriage expenses of the sons and the like. According to the Sub Court, there was no proof at all that the creditors were paid, that the money was utilised for the son's marriages, or for digging a well or for providing the daughter with presents. On this finding, the Sub Court's conclusion was that the sale was intended to defeat the creditors. One could understand a conclusion of this kind being drawn if the evidence showed that the sale proceeds had been frittered away by the debtor in meeting sundry expenses and not in the repaying of the debts. But when once the Court had rejected the evidence of the debtor as to the appropriation made by him of the sale proceeds, then there is no basis on which it could be held that the proceeds were utilised in some fashion which would indicate that the very intention of the sale was to defeat the creditors. The intention to defeat the creditors might very well be established by showing that the sale proceeds were frittered away in meeting the sundry expenses and not in repaying of the debts. Where the only evidence as to the disbursement of the sale proceeds is rejected, then it is not possible to draw an inference thereafter as to the intention with which the sale had been effected. This shows there is no evidence even as to the appropriation of the sale proceeds. There would, therefore, be much lesse evidence as to the intention with which the sale would have been effected.

8. There was much argument at the bar as to whether the existence of other properties and assets in the hands of the debtor can amount to means to pay and to the existence of means in the hands of the debtor to pay the debts. Mr. S. Sitharama Iyer, learned counsel for the petitioning creditor, referred to a judgment of the Calcutta High Court in *Pratapmall Rameshwar .v. Chunilal Jahuri* which was to the effect that a debtor may have assets which, if liquidated, may provide sufficient money to discharge his debts, and yet if he had no liquid assets where with to pay his debts at present, he would not be regarded as "one able to pay his debts" within the meaning of section 13 (4) (*b*) of the Presidency Towns Insolvency Act, 1909 which corresponds

1. I.L.R. (1933) 60 Cal. 345.

to section 25 of the Provincial Insolvency Act, 1920. Mr. Sitarama Iyer also pointed out that the judgment of the Calcutta High Court had been followed and applied by this Court in *Chidambaram Chettiar* v. *Daivanai Achi*[1] and *Chinnappa Reddy* v. *Venkobayya*.[2] These cases have reference to that portion of section 25 (1) of the Provincial Insolvency Act which compelled the Insolvency Court to dismiss a creditor's petition "if it is satisfied by the debtor that he is able to pay his debts". I have earlier pointed out that section 25 (1) lays down a number of compelling circumstances in which the Court ought to pass an order dismissing a creditor's petition to adjudicate his debtor as an insolvent. I had earlier referred to two of the grounds, one being that the Court is not satisfied with the proof adduced by the creditor as to the act of insolvency alleged against him by his debtor; and the other ground which I had earlier referred to is that which compels the Court to dismiss a creditor's petition on some sufficient cause which enables the Court to form the belief that an order of adjudication ought not to be made against a debtor. The learned Chief Justice of the Calcutta High Court was dealing with yet another ground on which a creditor's petition has got to be dismissed by the Insolvency Court and that is where the debtor comes forward and satisfies that Court that he is able to pay his debts. This ground is open to the debtor despite the fact that a creditor is in a position to adduce sufficiant proof of the act of Insolvency alleged by him.

9. The grounds on which the creditor's petition should be dismissed are independent grounds, the presence of one alone would be sufficient to compel a Court to dismiss a creditor's petition. This being so, it may not be necessary at all for me to go into the applicability of the rule laid down by the learned Chief Justice of the Calcutta High Court to the facts of the present case since I had already held that the circumstances in the present case warrant that an order of adjudication ought not to be made because the proceedings had been launched by the creditor not *bona fide* but in order to circumvent the provisious of Act X of 1975. Besides, I have also held that there is yet another independent ground on which the Court ought to have dismissed the insolvency petition and that is on the score that there is no proof adduced by the creditor in this case that the sale of some of the debtor's property for Rs. 33,000 was in fact effected with intent to defraud the creditors.

10. Mr. Sitarama Iyer submitted that although there may not be sufficient evidence to show that the debtor intended to defeat the creditor by the sale of the properties, yet his own evidence to the effect that he would be repaying the debt from out of the income from the lands within a period of three years showed that his intention was to delay the payment. I do not accept this argument as tenable. If the debtor were to say that he would not sell his properties, but he would utilise the income from the properties to repay his debts, that cannot be regarded as an intention to delay the creditors. There is no law that I know of which compels a debtor to sell his assets to pay his debts excepting in execution of money decrees. Therefore, where a debtor announces that it is his intention to hold his property intact, but to utilise the income there from to pay off his creditors, that cannot be regarded as delaying his creditors. In any ease, that cannot fall under section 6 (*b*) of the Provincial Insolvency Act. For mere delaying the payment to the creditors is not *perse* an act of insolvency. Section 6 (*b*) lays down that the sale of the debtor's properties must be with intent to delay the creditors. The act of sale itself is the method by which the debtor carries out his intention to delay the creditor. Where a debtor does not want to dispose of his properties, but wishes to retain them, earn income therefrom and then pay the creditors, the process may, according to circumstances, involve delay in payment of the creditors. But that would not bring the case under section 6 (*b*) of the act.

11. For all the above reasons, I am satisfied that the order of adjudication passed by the Sub Court and confirmed by the District Court is not only illegal,

1. (1936) 43 L.W. 516: A.I.R. 1936 Mad. 275.
2. (1938) 47 L.W. 772 A.I.R. 1938 Mad. 489.

but against the mandate of section 25 (1) of the Act and, therefore, without jurisdiction. While the Courts ought to have dismissed the insolvency petition, they had done quite the opposite thing and this involves an error of jurisdiction apart from an error in the application of the law. This revision is accordingly, allowed and the orders of the Sub-Court and the District Court are set aside. The result is that the insolvency petition filed against the debtor in this case stands dismissed. The petitioner will have his costs from the respondent in this Court.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*Singaravelu, J.*

M. Khasim Khaleali ... *Petitioner**

v.

The State of Tamil Nadu, represented by the Accommodation Controller, Madras ... *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 4—Fixation of fair rent—Petition for—Rent Controller fixing fair rent lower than as claimed by landlord—Appeals by landlord and tenant against the quantum—Appeals heard by different Appellate Authorities —Tenant's appeal dismissed— Fair rent fixed by Controller reduced in landlord's appeal—Revision by landlord—Appellate Authority held not competent to reduce fair rent fixed by Rent Controller.

Fair rent was fixed on landlord's application to the Rent Controller under section 4 of Act XVIII of 1960. Both the landlord and the tenants preferred appeals against the order. The appeals were heard by different Authorities. The tenant's appeal was dismissed and the fair rent fixed by the Controller was confirmed and became final. In the landlord's appeal, the fair rent fixed was reduced resulting in two inconsistent orders.

On revision by the landlord,

Held: When a landlord files an appeal on the ground that the quantum of fair rent fixed by the Rent Controller is low, the Appellate Authority can only dismiss the appeal or grant enhancement, but cannot reduce the amount, unless the tenant has also filed an appeal or cross-appeal questioning the quantum.

[*Para.* 4.]

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973, praying the High Court to revise the Order of the Court of Small Causes (IV Judge) Madras dated 12th December, 1978, and made in H. R. A. No. 521 of 1978 (H. R. C. No. 143 of 1973, dated 22nd April, 1978 on the file of the Court of Small Causes (VII Judge), Madras.

M. A. Ghatala and *Mateen Ghatala*, for Petitioner.

The Additional Government Pleader, for Respondent.

The Court delivered the following

JUDGMENT.—The landlord is the revision petitioner. The landlord filed an application under section 4 of XVIII of 1960 for the fixation of fair rent in respect of a non-residential building. The respondent-tenant is the State of Madras, represented by the Accommodation Controller.

2. The landlord in his petition wanted a rent of Rs. 32,500 to be fixed as the fair rent for the building. This application was resisted by the respondent and after recording evidence the Rent Controller fixed the fair rent at Rs. 28,000 per month. Aggrieved by this order, both parties preferred appeals, the landlord filing an appeal in H. R. A. No. 521 of 1978 and the tenant preferring an appeal in H. R. A. No. 483 of 1978. Unfortunately, both appeals were lying before different Courts and this was not brought to the notice of the Appellate Authority, by either party. Therefore, the two appeals were heard separately by different Authorities and judgments were rendered. In the appeal by the tenant in H. R. A. No. 483 of 1978 the fair rent was confirmed at Rs. 28,000 per month and consequently the appeal was dismissed on 5th December, 1978. Subsequently, on 12th December, 1978, the appeal filed by the landlord was taken up by a different Judge and in that H. R. A. No. 521 of 1978 the appellate authority has

*C. R. P. No. 756 of 1980. 29th October, 1981.

passed the order thus:—"The appeal is accordingly allowed........Fair rent is fixed at Rs 21,943 per month". This operative portion of the order reducing the quantum is ununderstandable and is not in conformity with reason or propriety. Be that as it may, there are now conflicting decisions with regard to the fair rent in respect of the same premises between the same parties.

3. As pointed out already, the appellate authority in H.R.A. No. 483 of 1978 confirmed the finding of the Rent Controller and fixed the fair rent at Rs. 28,000 per month. This has become final. While so, another appellate authority in H.R.A. No. 521 of 1978 has fixed the fair rent at Rs. 21,943 per month for the same premises and passed the order on 12th December, 1978, subsequent to the decision in H.R.A. No. 483 of 1978. These two orders are mutually contradictory and irreconcilable. This is also an act of impropriety and also illegality warranting interference of this Court under section 25 of Act XVIII of 1960.

4. The landlord was not satisfied with the quantum of rent fixed by the Rent Controller and therefore preferred an appeal. The Appellate Authority could either have dismissed the appeal or granted enhancement. In fact, the Appellate Authority has no other option under law, but curiously, it has "allowed the appeal" by the landlord and reduced the fair rent, more so when the appeal by the tenant was already dismissed. This is clearly illegal. When a landlord files an appeal on the ground that the quantum of fair rent fixed by the Rent Controller is low, the Appellate Authority can only dismiss the appeal or grant enhancement, but cannot reduce the amount, unless the tenant has also filed an appeal or cross appeal questioning the quantum. The landlord should not be made worse off for having filed the appeal and he has been penalised in this case for preferring the appeal.

5. Accordingly, it is ordered that the fair rent for the premises is fixed at Rs. 28,000 per month as already confirmed by the Appellate Authority in H.R A. No. 483 of 1978. In this view of the matter, the order in H.R.A. No. 521 of 1978 is set aside and the Revision Petition is allowed and the order of the Rent Controller is restored. Each party to bear his own costs.

S J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

P. Thangaraju Pillai ... *Petitioner**

v.

Periaswamy Pillai and others ... *Respondents.*

(A) *Provincial Insolvency Act (V of 1920), sections 10, 24 (1)* (a)— *Enquiry into insolvency petition—Jurisdiction of Court.*

(B) *Provincial Insolvency Act (V of 1920), section 75 (2)—Jurisdiction of Court setting in revision only limited.*

The provisions of section 10 of the Provincial Insolvency Act read in conjunction with the proviso to section 24 (1) (*a*) may be said to steer a middle course in the matter of enquiry into an insolvency petition. On the one hand, the clear intendment of the legislature is that the debtor cannot have an order of adjudication for the mere asking. On the other hand, it is not within the contemplation of the Act that the Court should be engaged in a full-fledged or all-out inquiry on the debtor's petition before rendering its finding, one way or the other, whether the petition should be allowed or rejected. In between the two possible extremities of trial, what the Act provides for is the conduct of a *prima facie* inquiry so that the Court may be satisfied that the debtor is unable to pay his debts. The proviso, in terms, rules out any insistence by the Court on the debtor furnishing any proof beyond that which can be regarded as *prima facie* proof. The proviso further provides, in a negative fashion, that the Court shall not be bound to hear any further evidence if it is satisfied that there are *prima facie* grounds for believing the evidence of the petitioner. The Court should not embark on an elaborate trial procedure for the purpose of deciding the correctness or the probative value of the petition filed by the

*C. R. P. No. 2698 of 1978. 11*th April*, 1980.

debtor for adjudicating himself as insolvent. Hence, if the Court exceeds the bounds of this limited *prima facie* inquiry, then it would be committing an excess of jurisdiction and the order is liable to be set aside on that ground. [*Paras.* 9 *and* 15.]

Though section 24 (2) requires the debtor to be examined by the Court and it also confers a right on the creditors to question the debtor, independent testimony from them at that stage has got to be completely eschewed. This is because the proviso says that the Court shall not be bound to hear any further evidence beyond requiring the petitioner to furnish such proof as to satisfy the Court that there are *prima facie* grounds for believing the contention of the petitioner. Allowing the creditors to introduce documentary evidence carries the matter beyond the bounds of *prima facie* proof even if it be in the context of the cross-examination of the petitioner. [*Para.* 16.]

Dealing with the scope of the High Court's jurisdiction under this section, the Supreme Court observed that the first proviso to section 75 of the Act provided that the High Court for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit. Elaborating the theme of this proviso, the Supreme Court held that the legislature did not confer on the High Court, an appellate power, nor did it confer on it a jurisdiction to reappreciate the evidence on record. The Supreme Court further held that while exercising that power the High Court is, by and large, bound by the findings of fact reached by the District Court, and even if there had been a wrong decision on facts that decision must be regarded as one according to law so long as it has been rendered by a competent Court. The Supreme Court discourged any re-examination of the findings of fact of the Courts below by the High Court exercising its revisional jurisdiction under the 1st proviso of section 75 of the Act. [*Para.* 19.]

Cases referred to:—

Narayanappa v. *Bheemuppa*, (1926) 24 L.W. 219: A.I.R. 1926 Mad. 494; *Srirangachariar* v. *Narasimha Iyer*, A.I.R. 1928 Mad. 1193; *Chatrapat Singh Dugar* v. *Kharag Singh Lachmiram*, 44 I.A. 11: (1917) 32 M.L.J. 1: A.I.R. 1916 P.C. 64; *Malint Ayyappa Naicker (dead) by his representative* v. *Seth Manghraj Udhayadas Firm*, (1970) 1 M.L.J. (S.C.) 1: (1969) 2 S.C.J. 831: (1970) 1 An. W.R. (S.C.) 1: (1969) 3 S.C.R. 698: (1969) 1 S.C.C. 688: A.I.R. 1969 S.C. 1344; *Mohanakrishnan* v. *Gopalaswami Naidu*, (1969) 2 M.L.J. 140: 82 L.W. 215; *Karmegam* v. *Jayaseelan Chettiar*, (1976) 2 M.L.J. 342: I.L.R. (1976) 3 Mad. 292: 82 L.W. 547: A.I.R. 1977 Mad. 250; *Lingasami Gounder* v. *S. K. Subramanian*, (1974) 2 M.L.J. 166: 87 L.W. 569.

Petition under section 75 (1) of the Provincial Insolvency Act, 1920 praying the High Court to revise the Order of the District Court. Tiruchirapalli, dated 21st September, 1978 and made in C.M.A. No. 38 of 1977 (I. P. No. 9 of 1974, D.M.C. Kulithalai).

E. Padmanabhan, for Petitioner.

T. R. Venkataraman, for Respondents.

The. Court delivered the following

JUDGMENT.—This revision is brought before this Court under section 75 (1) of the Provincial Insolvency Act, 1920 by the debtor who filed an application under section 10 of that Act for adjudicating himself as an insolvent. His petition was dismissed by the learned District Munsif, Kulithalai, that decision was confirmed in appeal by the learned District Judge, Tiruchirapalli.

2. In his petition filed under section 10 of the Act, the petitioner stated that he owed debts to the extent of Rs. 3,750 to respondents 1 to 6 and that respondents 1 to 3 had filed execution petition for his arrest for the realisation of the decree debt due to them. He further stated that the total value of the assets owned by him, amounted to only Rs. 250. Respondents 1 to 3, who are the petitioner's sons, opposed the application. They alleged that the debts set out in the schedule to the petitioner's application, included certain fictitious items. They further stated that the petitioner owns lands of an extent of 45 cents worth Rs. 5,000 and that this item of property would be enough to discharge the debts. They also referred to Maligai business carried on by the petitioner which, according to them, would yield Rs. 200 per mensem by way of earnings.

3. The learned District Munsif held an inquiry into the petition. At the inquiry, the petitioner was examined as P.W. 1. In the course of his evidence, he stated that he had no property and that the maligai shop, which he had, had been closed. He denied that the schedule of debts included fictitious items. He also referred to the land of the extent of 45 cents and said that this land was assigned to him by the Government but it had since been resumed by the Government. In cross-examination by respondents 1 to 3, an adangal extract marked a Exhibit B-1, dated 17th November, 1964 relating to the fasli 1370 in respect of S. No. 657 in Thenbagam village, was put before the petitioner and he was cross-examined by the respondents on that subject. The petitioner accepted that Exhibit B-1 was the adangal in respect of the land of extent of 45 cents, but it had since remained uncultivated. In any case, it had been subsequently resumed by the Government. He further stated that he did not file the order of the Government resuming the land. It may be observed that no questions were asked in cross-examination by the respondents as to the value of the said land.

4. The respondents also filed Exhibit B-2 the certified copy of a decree in O. S. No. 164 of 1965, on the file of the Sub-Court, Tiruchy. The decree was obtained by respondents 1 to 3 and their mother as against the petitioner herein. This decree was relied on to show that the petitioner had some share in the properties set out in the said decree.

5. The learned District Munsif, relying on the adangal extract and the partition decree (Exhibits B-1 and B-2) held that the petitioner had concealed a number of properties and hence there was no ground for holding that he was unable to pay debts. The learned District Munsif did not give any finding in regard to the existence of the maligai business.

6. From the judgment in the appeal it would appear that the learned District Judge had accepted the evidence of the petitioner that he had closed the maligai shop long ago. The learned District Judge, however, held that the petitioner did not disclose his ownership of 45 cents of land and the suppression of this land, as an item of his assets, was an abuse of the process of Court. The learned Distric Judge did notice that Exhibit B-1 the adan gal extract related only to the fasli 1370 *i.e.*, for the year 1960-61. But the learned Judge proceeded to hold that there was no evidence to show that subsequently. the land had been resumed by the Government. The learned Judge was prepared to assume the value of the said item of property as Rs. 5,000, which was very much more than the total debts which were scheduled in the petition. On these reasonings, the learned District Judge held that there was a wilful suppression of an item of asset whose value was more than the total debts payable by the debtor and this was a clear case of abuse of process of Court. He accordingly dismissed the appeal and confirmed the order of the District Munsif dismissing the petition.

7. In this revision petition brought by the petitioner, Mr. E. Padmanabhan, his learned counsel made two submissions. The first was that the Courts below had misconceived their jurisdiction in so far as they had embarked upon an inquiry which was wider in ambit than the inquiry contemplated under the proviso to section 24 (1) (*a*) of the Provincial Insolvency Act, 1920. His second submission was that even otherwise there was no evidence whatever to show that the debtor had suppressed assets which would be worth more than the value of the debts which were due and payableby him.

8. Mr. Venkataraman, learned counsel for respondents 1 to 3, however, submitted that there was no error of jurisdiction which was discernible in the judgment of the Courts below. He further urged this Court sitting in revision under the first proviso to section 75 (1) of the Act could not interfere with the findings arrived at by the Courts below merely on the score that the findings cannot be supported by the evidence on record.

9. Learned counsel on both sides, cited copiously precedents from reported cases. I shall mention only a few of them for the limited purpose of the present petition. But before proceeding to refer to the case law, I may observe that under the Provincial Insolvency Act, 1920 the right

of a debtor to present an insolvency petition has been laid down in terms which do not in my judgment, leave any doubt whatever to any one seeking to construe the provisions. Section 10 (1) of the Act provides that a debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts, and one or other of three conditions is also present as set out in clauses (*a*) to (*c*) in that sub-section. Clause (*a*) refers to 'the petitioner's debts amounting to five hundred rupees; Clause (*b*) refers to the circumstance that the petitioner is under arrest or imprisonment in execution of the decree of any Court for the payment of money; and Clause (*c*) refers to the subsisting attachment of some properties of his in execution of a money decree against him. It would have been noticed that the opening words of section 10 of the Act which provide that a debtor shall not be entitled to present an insolvency petition, unless he is unable to pay his debts, not only lay down clearly the condition under which he can present a petition, but by the same token also provide that the onus of proof of establishing inability to pay the debts is squarely on the petitioner himself. It is in this context that section 10 of the Act has to be read in conjunction with the proviso to section 24 (1) (*a*) of the Act. The latter section lays down the procedure at hearing of the petition by the Court. Section 24 (1) of the Act provides that on the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned' the Court shall require among other things, proof to the effect that the creditor or the debtor, as the case may be, is entitled to present the petition. The proviso to section 24 (1) (*a*) contains the nature and course of the inquiry at the hearing, as well as the limits of that inquiry. The proviso reads as follows:—

> "Provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing the same and the Court, if and when so satisfied shall not be bound to hear any further evidence thereon;"

Pausing here for a moment, I may observe that the provisions of section 10 of the Act read in conjunction with the proviso to section 24 (1) (*a*) may be said to steer a middle course in the matter of inquiry into an insolvency petition. On the one hand, the clear intendment of the legislature is that the debtor cannot have an order of adjudication for the mere asking. On the other hand, it is not within the contemplation of the Act that the Court should be engaged in a full-fledged or all-out inquiry on the debtor's petition before rendering its finding, one way or the other, whether the petition should be allowed or rejected. In between the two possible extremities of trial. what the Act provides for is the conduct of a *prima facie* inquiry so that the Court may be satisfied that the debtor is unable to pay his debts. The proviso, in terms, rules out any insistence by the Court on the debtor furnishing any proof beyond that which can be regarded as *prima facie* proof. The proviso further provides, in a negative fashion, that the Court shall not be bound to hear any further evidence if it is satisfied that there are *prima facie* grounds for believing the evidence of the petitioner.

10. Mr. Venkataraman, learned counsel for the respondents, relied on section 24 (2) of the Act which empowers the Court not only to examine the debtor, when he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, but also provides that the creditors 'shall have the right to question the debtor thereon." Learned counsel urged that a provision such as section 24 (2) in the Act is a clear indication of the rights of the creditors to cross-examine the debtor when he is examined by the Court on the petition filed by him. Learned counsel submitted that in the present case both the learned District Munsif and the learned District Judge in appeal had not exceeded the bounds of the inquiry under section 24 of the Act when they took note of the answers elicited from the debtors in the course of his cross-examination by the respondents. In these circumstances, he submitted that the inquiry conducted by the trial Court as well as by the learned

District Judge in appeal cannot be regarded as being in excess of their jurisdiction.

11. Learned counsel for the petitioner however, pointed out that in so far as the trial Court allowed the respondents to question the debtor as respects the assets covered by Exhibits B-1 and B-2, the scope of the inquiry had been enlarged beyond the ambit provided thereon by the proviso to section 24 (1) (*a*). Learned counsel for the petitioner cited two early dicisions of this Court. The one reported as *Narayanappa* v. *Bheemappa*[1], is a ruling of a decision Bench consisting of Devadoss and Waller, JJ., In that case, in the petition filed by the debtor for adjudicating him as an insolvent, he had stated that his properties were worth only Rs. 10,000 whereas his debts were Rs. 25,000 and odd. He further stated that he was unable to meet his liabilities. The petition was dismissed by the trial Court. In the revision brought before it, the Division Bench observed that when a person presents a petition to be adjudicated as insolvent, that petition itself is treated as an act of bankruptcy under Insolvency law and when he says that his liabilities are more than his assets, that must be taken as some evidence that he is unable to meet his debts. After referring to the provisions of section 24 of the Provincial Insolvency Act, the Division Bench observed that in that case the Court below had taken evidence to consider whether some of the debts mentioned in the petition were real debts. According to the Division Bench, such an inquiry should not be held for the purpose of considering whether the application of the petitioner should be granted or not.

12. *In Srirangachariar* v. *Narasimha Iyer*[2] the abovesaid decision was referred to by Devadoss, J., who constituted the division Bench in that case along with Waller, J. In this case, a petition by a debtor under section 10 of the Act was opposed by the creditors on the ground that he was in possession of large extent of properties and that he had suppressed their existence. This plea was accepted by the Insolvency Court and the petition was dismissed. On revision, Devadoss, J. observed that the proof that is required under the proviso of section 24 (*a*) of the Act was only *prima facie* proof and that the mere fact that the debtor had large properties, can be no ground for holding that he was able to pay his debts. One of the contentions which was accepted by the Court below in that case was that the petitioners had suppressed their assets. Dealing with that aspect, the learned Judge observed that this was not germane to the enquiry which a Court ought to hold under section 24 of the Act. The learned Judge further observed that the fact that the petitioners had not brought to the notice of the Court all the properties was no ground for holding that he was able to pay his debts. Even otherwise, it was observed that in an enquiry under section 24, a Court is not entitled to consider whether the debtor has committed acts which would make him liable under the penal provisions of the Insolvency Act.

1. (1926) 24 L.W. 219: A.I.R. 1926 Mad. 494.
2. A.I.R. 1928 Mad. 1193,

13. The later decisions of this Court only tend to re-emphasise the limited scope of the inquiry under the proviso to section 24 (1). Learned counsel for the petitioner cited three of them, all decided by Ramaprasada Rao, J. (as he then was), in *Mohanakrishnan* v. *Gopalaswami Naidu*[1] *Karmagam* v. *Jayaseelan Chettiar*[2] and *Lingasami Gounder* v. *S. K. Subramanian*[3].

14. Reference was also made in the course of argument to an earlier decision of the Privy Counsil reported in *Chatrapat Singh Dugar* v. *Khwrag Singh*[4]. That case, however, arose under the earlier provincial Insolvency Act, 1907 which the Provincial Insolvency Act, 1920 repealed. It may be observed that in the Provincial Insolvency Act, 1907, the provisions which correspond to the present section 10 of the Provincial Insolvency Act, 1920, were differently couched. Besides, the scope of the enquiry with a debtor's petition which are now clearly provided for under the proviso to section 24 (1) (*a*) were not in terms enacted in the earlier Act. Subject to these distinctions, however, subsequent

1. (1969) 2 M.L.J. 140: 82 L.W. 215.
2. (1976) 89 L.W. 547: (1976) 2 M.L.J. 342: I.L.R. (1976) 3 Mad. 292: A.I.R. 1977 Mad. 250.
3. (1974) 2 M.L.J. 166: (1974) 87 L.W. 567.
4 (1917) 44 I.A. 11: 32 M.L.J. 1: A.I.R. 1916 P.C. 64,

decisions of Courts have referred to the Privy Council decision as laying down the proper approach of the Courts to a petition filed by a debtor for adjudicating himself as an insolvent. I shall have occasion to refer to this Privy Council ruling a little later while discussing another aspect of this case.

15. The sum and substance of the case law on the subject, however, reiterates what is made clear by the very terms of the proviso to section 24 (1) (*a*). As I have already observed, the Court should not embark on an elaborate trial procedure for the purpose of deciding the correctness or the probative value of the petition filed by the debtor for adjudicating himself as insolvent. Hence, if the Court exceeds the bounds of this limited *prima facie*, inquiry, then it would be committing an excess of jurisdiction and its order is liable to be set aside on that ground.

16 In the present case, I am prepared to accept the contention of Mr. Venkatraman, learned counsel for the the respondents, that the Insolvency Court was well within its rights in allowing the respondents to cross-examine the debtor after he was examined tn Chief, but the introduction, at the stage of cross-examination by the respondents, of documentary evidence, does in my judgment, enlarge the scope of the enquiry beyond the legitimate bounds of section 24 proviso. It may be observed that though sub-section (2) of section 24 requires the debtor to be examined by the Court and it also confers a right on the creditors to question the debtor, independent testimony from the side of the creditors, at that stage, has got to be completely eschewed This is because the proviso very clearly says that the Court shall not be bound to hear any further evidence beyond requiring the petitioner to furnish such proof as to satisfy the Court that there are *prima facie* grounds far believing the contention of the petitioner. To the extent, therefore, that the Courts below had allowed the respondents to introduce documentary evidence, which carried the matter beyond the bounds of *prima facie* proof, even if it is be in the context of their cross examination of the petitioner, to that extent in any judgment, the inquiry had exceeded the limits set for it by the proviso to section 24 (1) (*a*) of the Act.

17. Even on the footing that 45 cents of property in Thenbagam village really belonged to the petitioner on the basis of Exhibits B-1 and B-2, there was nothing to show that the property continued to remain in the hands of the debtor especially when in answer to a question in cross-examination, the debtor had categorically stated that the Government had resumed the said land. Quite apart from the unsatisfactory nature of the evidence regarding the existence of this item of property as part of the assets of the petitioner, there is also the question of its value. While the respondents had asserted in the counter-affidavit which they had filed before the Court below that 45 cents of property in that village were worth Rs. 5,000 there was no evidence whatever on record of the said value. No attempt was made by the respondents, even in their cross-examination of the petitioner, to suggest what the value of the property was or that the value was Rs. 5,000. While the learned District Judge seemed quite sure about the value of the property being Rs. 5,000 there is absolutely no evidence whatever to show that this property was worth Rs. 5,000. There was only an assertion by the respondents in their counter affidavit about this figure. Hence even on the state of the evidence on record, the Courts below were not justified in coming to the conclusion that the assets possessed by the debtor were in excess of his liability.

18. Learned counsel for the petitioner also submitted that the ground upon which the learned District Judge rejected the petition in confirming the order of dismissal of the trial Court, namely, that this was an abuse of the process of Court, introduces an alien element into the discussion. He cited the observations of the Privy Council in the case which he had earlier referred to. In the case before the Privy Council also, it was contended on behalf of the creditors that the debtor's petition was an abuse of the process of Court. In dealing with that contention, the Privy Council observed as follows:—

> "What was held was that the application was an abuse of the process of the Court and so must be dismissed. ... ...
> It is to be regretted that the Courts in India allowed themselves to be influenced by this plea, instead of being guided to their decision by the provisions of the Act. In clear

and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an "abuse of the process of the Conrt". This case illustrates the peril of this dectrine in India, for what has been treated by the Courts below as such an abuse appears to their Lordships in no way to merit this censure."

I had earlier pointed out that the main ground on which the learned District Judge confirmed the order of dismissal passed by the District Munsif of the debtor's petition in this case was that the suppression by the debtor of the land of the extent of 45 cents was an 'abuse of process of Court.' Following the Privy Council's decision, I am disposed to hold that what is regarded an an abuse of the Court process has no relevance to the inquiry which the Court has to hold. Even otherwise, on the basis of the decision of Devadoss, J., in *Srirangachariars case*[1] the mere suppression, even if there had been a suppression of that property, cannot be a ground for rejecting the petition filed by the debtor under section 10 of the Act. In this case, I have earlier referred to that part of the evidence of the debtor relating to the existence of this item of property and I had observed that there was no acceptable evidence to show that the property is still in the hands of the petitioner.

19. Mr. Venkataraman, for the crerditors reminded me about the limited jurisdiction of this Court setting in revision under section 75 (2) of the Act. In that connection, he cited a decision of the Supreme Court reported in *Malini Ayyappa Naicker (dead) by his legal representative* v. *Seth Manghraj Udhavadas firm*[2]. Dealing with the scope of the High Court's jurisdiction under this section, the Supreme Court observed that the 1st proviso to section 75 of the Act provided that the High Court for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect there to as it thinks fit. Elaborating the theme of this proviso, the Supreme Court held that the legislature did not confer on the High Court, an appellate power, nor did it confer on it a jurisdiction to reappreciate the evidence on record. The Supreme Court further held that while exercising that power the High Court is, by and large, bound by the findings of fact reached by the District Court, and even if there had been a wrong decision on facts that decision must be regarded as one according to law so long as it has been rendered by a competent Court. The Supreme Court discouraged any re-examination of the findings of fact of the Courts below by the High Court exercising its revisional jurisdiction under the 1st proviso of section 75 of the Act.

20. In my view, the caution uttered by Mr. Venkataraman, based on the proviso to section 75 (1) of the Act might have been saved in the present case. My purpose in referring to the evidence in some detail was not to reappreciate it or to draw my own inferences therefrom, but to show in what manner admission of such evidence was based on a misconception of the jurisdiction of the Court, having regard to the scope of the enquiry laid down by the proviso to section 24 (1) (a) of the Act. I have earlier observed not merely with reference to decided cases on the subject, that the enquiry which had been gone into by the Courts below falls outside their jurisdiction. I am satisfied that the petitioner in this case must succeed in this revision petition on that point. The revision petition is accordingly allowed. The orders of the Courts below are set aside and the Insolvency Petition No. 9 of 1974 is allowed. There will, however, be no orders as to costs.

R.S. —— *Petition allowed.*

1. A.I.R. 1928 Mad. 1193.
2. (1970) 1 M.L.J. (S.C.) 1: (1969) 2 S.C.J. 831: (1970) 1 An. W.R. (S.C.) 1: (1969) 3 S.C.R. 698: (1969) 1 S.C.C. 688: A.I.R. 1969 S.C. 1344.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*T. Sathiadev, J.*

V. Sellappan ... *Petitioner**

v.

The District Revenue Officer, Thanjavur and three others ... *Respondents.*

Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (L of 1969), section 7—Power of Revisional Authority—Scope and applicability — Petitioner's name entered in Register as tenant — Final publication in District Gazette — Four years later application by land-owner for rectification — Application dismissed as well as appeal therefrom—Revision also dismissed but later on restored — Order passed for removal of entry from the Register — Order whether liable to be quashed.

The Revisional Authority [under section 7 of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act cannot dismiss the petition without going into the points taken and it has to render its final decision both on facts and law. In the instant case the order of 27th July, 1978 of dismissal for default being tantamount to failure to exercise jurisdiction vested in it, it had powers to restore the application and dispose of it on merits. [*Para.* 9.]

When a power is conferred on the Authority, he has to perform it from time to time, as occasion requires. Section 7 of Act L of 1969 says that it is open to the Authority to pass order as 'he may think fit'. It is not an arbitrary power that could be exercised, but the Revisional Authority is to exercise such powers as spelt out by the Supreme Court in *Income-tax Officer* v. *Mohamed Kunchi*, (1969) 1 S.C.J. 772: (1969) 1 I.T.J. 458: A.I.R. 1969 S.C. 430 and *J.M.D. Syndicate v. Income-tax Commissioner, New Delhi* (1977) 1 S.C.C. 508: (1977) 2 S.C.R. 460: A.I.R. 1977 S.C. 1348, by passing considered orders with reasons, both on facts and law. Hence the order dated 27th July, 1978, being *non-est* thereafter, he realised that such an order could not be a lawful order, and therefore, as occasion required for the matter to be heard in detail in the presence of both the parties, he issued notices to the petitioner, who also willingly responded and participated in the hearing. Having thus exercised the power lawfully it will not be proper to hold that the impugned order was passed without jurisdiction or that the order of restoration is against the provisions of the Act and Rules. [*Para.* 13.]

Cases referred to:—

Commissioner of Income-tax v. *Chenniappa Mudaliar*, (1969) 74 I.T.R. 41: (1969) 2 I.T.J. 496: (1969) 2 S.C.J. 574: (1969) 2 M.L.J. (S.C.) 90: (1969) 2 An. W.R. (S.C.) 90: A.I.R. 1969 S.C. 1068; *Income-tax Officer* v. *M. K. Mohammad Kunchi*, (1969) 1 S.C.J. 772: (1969) 1 I.T.J. 458: (1969) 2 S.C.R. 65: A.I.R. 1969 S.C. 430; *J. N. D. Syndicate* v. *Income-tax Commissioner*, (1977) 1 S.C.C. 508: (1977) 2 S.C.R. 460: (1977) Tax. L.R. 685: A.I.R. 1977 S.C. 1348; *Subhash Chandra* v. *Bodh Raj*, A.I.R. 1969 J. & K. 8; *V. Usman* v. *Muthukrishnan*, (1978) 1 M.L.J. 10: 90 L.W. 711: A.I.R. 1978 Mad. 158.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records comprised in the proceedings of the first Respondent, dated 20th June, 1979 in R.P. No. 23 of 1978-J, 2, and quash the said order and made therein.

V. Ramajagadeesan, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents 1 to 3.

B. Kumar, Advocate, for 4th Respondent.

The Court made the following

ORDER.— The petitioner claims that he is a cultivating tenant within the ambit of Act X of 1969 and that the lands belonged to 4th respondent. Petitioner's name was entered in the Registers, and finally published in the District Gazette on 24th May, 1971, as a tenant. Nearly after six

*W. P. No. 3351 of 1979. *3rd September*, 1981.

years, 4th respondent had filed an application before third respondent for rectification, which was dismissed. The appeal preferred to second respondent was also rejected. A further revision filed to first respondent was first dismissed for default by order, dated 27th July, 1978, but later on it was restored, and ultimately by the impugned order dated 20th June, 1975, the revision petition was allowed resulting in the removal of the name of the petitioner from the records as a tenant, Aggrieved against the said order, this writ petition is filed.

2. Mr. V. Ramajagadeesan, learned counsel for the petitioner, first submits that having dismissed the revision petition for default, the Revisional Authority has no jurisdiction to restore the application, and thereafter to dispose of it on merits. He refers to section 7 of the Act, which according to him, nowhere deals with a power invested in the Revisional Authority to revise an order, which had been already rejected. He states that there being no power of review invested in the said Authority, the impugned order is illegal. He also relies upon rule 13 of the Rules framed under the Act, which only contemplates the power to entertain application for revision presented beyond time.

3. He then refers to rule 8 (*ii*) (*g*) of Rules framed under Act XXV of 1955, which enables the constituted Court to dismiss a petition for default of appearance and to set aside such an order for good cause. He then refers to rule 4 (*g*) of the Rules framed under Madras Act XXIV of 1956, which also enables the Rent Court and Rent Tribunal to dismiss a petition for default of appearance and set aside such an order for good cause. Likewise there being no provision made under Act X of 1963 or in the Rules framed thereunder, he contends that when the Magistrate having provided for such a situation in other cases had knowingly avoided to provide for restoration of an application dismissed for default. Hence first respondent had no power to restore a petition dismissed for default.

4. These contentions of the petitioner are refuted by alleging that the order, that is now sought to be quashed is not the order of restoration, but the final order passed on merits, and as the petitioner has lost on merits, he has now come forward to claim that there could have been no restoration at all.

5. There being delay in the presentation of the revision petition, it was dismissed for default by order, dated 27th July, 1975, after issue of notice to both the parties. Thereafter it has been restored. Petitioner would state that it was done without any notice. If he is aggrieved by the order of restoration, he should have instituted proceedings challenging the order of restoration. Instead, he participated in the revision petition proceedings. Later on, it resulted in the impugned order being passed. He had acquiesced in the proceedings and he had never raised any objection regarding the maintainability or the jurisdiction of the first respondent. Therefore, having acquiesced in the proceedigns, he cannot, at this stage, challenge the order of restoration.

6. Petitioner would then contend that no party can confer jurisdiction on an authority, and therefore, the plea of acquiescence is without any substance. The finding given in the impugned case is not on the basis of parties conferring jurisdiction on an authority, but on the basis that the Revisional Authority has jurisdiction to set aside an inchoate order and that participation in such a proceeding would deprive the participant from later on challenging the jurisdiction of the Authority. Section 7 of the Act enables the Revisional Authority to examine the records and pass such orders as he may think fit. He is also conferred with '*suo motu*' powers. Under section 10 of the Act, even the Revisional Authority has the jurisdiction to entertain fresh evidence both oral and documentary. Hence, in section 7 of the Act, it has been made more or less a second Appellate Authority. Hence, though in section 7 of the Act, it is characterised as a 'Revision' in every sense, it has been made more or less a second Appellate Authority. The power being exercised is not akin to the usual revisional powers, wherein the Authority will be conferred only with the right to go into the legality or propriety of the decision arrived at in order or to find out as to whether there has been a proper exercise of jurisdiction vested and whether there has been any material irregularity in

the order. Such restrictive qualifications not being found, necessarily the power under section 7 of the Act has to be treated as a very wide power, which could be invoked for rendering justice. as the Revisional Authority 'may think fit'. Hence, it would not be correct to contend that the power of the Revisional Authority under this Act is circumscribed, so as to preclude him from granting such relief, as he may think fit.

7. Mr. Kumar relies upon the decision in *Commissioner of income-tax, Madras* v. *S.Chenniappa Mudaliar*[1] for the proposition that whenever a power is vested in an Authority or Tribunal to dispose of the matter as it thinks fit, it cannot dismiss it for default of appearance, without passing an order both on law and facts, based on the points taken in the petition. His contention is that, the order passed on 27th July, 1978, dismissing the petition for default being contrary to law, it is *nonest* and therefore, even assuming that there was an order for restoration, it is also not challengable, and when the said petition is taken up for hearing, the Revisional Authority was exercising the powers under section 7 of the Act, so that he may pass a lawful order having failed to pass such an order on 27th July, 1978. To substantiate this contention, he relies upon the above said decision, which dealt with the scope of section 33 (4) of Income-tax Act, 1922 and which authorises the Appellate Tribunal under sub-section 4 to pass orders after giving both parties an opportunity of being heard, as it thinks fit; and which power has been construed by the Supreme Court, to hold that an order of dismissal for default without going into facts and law pertaining to the matter is illegal. Rule 24 of the Appellate Tribunal Rules, 1946, as amended in 1948 enabled the dismissal of a matter for default of appearance. The said Rule was struck down as contrary to the powers conferred under section 33 (4) of the Act, on the ground that the Appellate Tribunal has to dispose of the appeal as merits and 'cannot short-circuit the same by dismissing it for default of appearance'. Section 33 is equivalent to section 254 of the Amended Income-tax Act, and is akin to section 7 of Act X of 1969. Therefore there is a statutory compulsion on the Revisional Authority to dispose of the matter only by going into the facts and the law involved in the petition, and Revisional Authority has no jurisdiction to dismiss the petition for default of appearance.

8. Yet another decision relied upon in the one reported in *Income-tax Officer* v. *M. K. Mohammed Kunchi*[1], which arose under Income-tax Act, 1961, in which it was held that the power of the Tribunal is of the widest amplitude and such a statutory power impliedly grants the power of doing all such acts, or employing such means as are essentially necessary to the execution of such jurisdiction, and carried with it the power to stay proceedings in proper cases. There is no provision under the Act to stay recovery of penalty or tax due from an assessee when an appeal is pending before the Tribunal. Inspite of it, it was held by the Supreme Court that in deserving and appropriate cases, stay of collection of taxes can be granted, failing which it would make the power of appeal frustrated or rendered nugatory, and that the general principle that in a taxing statute there is no room for what could be called equitable construction applies only to the taxing part of the statute and not to its procedural part.

9. These two decisions of the Supreme Court make it amply clear that, even in the absence of a provision for dismissal for default and thereafter for restoration of the petition as provided under other enactments, in the absence of the petitioner or his counsel, the Revisional Authority under section 7 of t.e Act cannot dismiss the petition without going into the points taken in the petition, and it has to render its final decision both on facts and law. In this matter, the order passed on 27th July, 1978 being one which had resulted in the failure to exercise jurisdiction vested in the Revisional Authority, the impugned order had been passed within his jurisdiction.

10. No doubt reference is made to the following three decisions which are not

1. (1969) 2 I.T.J. 496: (1969) 2 S.C.J. 574: (1969) 2 M.L.J. (S.C.) 90: (1969) 2 An. W.R. (S.C.) 90. 1969) 74 I.T.R. 49: A.I.R. 1969 S.C. 1068.

1. (1969) 1 S.C.J. 772: (1969) 1 I.T.J. 458: (1969) 2 S.C.R. 65: A.I.R. 1969 S.C. 430.

quite necessary, but for the purpose of completeness they are being referred to.

11. In *J. N. D. Syndicate* v. *Income-tax Commissioner, New Delhi*[1], arising under the Income-tax Act, 1922, it was held that when a reference is made to the High Court, and in the absence of party, on the reference being dismissed, if the party shows adequate grounds later on for non-appearance, then, the High Court has an inherent power to recall its earlier order and dispose of the reference on merits. The Revisional Authority under the Act is not a Court, and there can be no inherent powers vested in him.

12. *Subhash Chander* v. *Bodh Raj*[2], is relied upon by the Government Pleader to contend that to rectify its own mistake, a Court has an inherent power, and when there is need to redress the wrong which has resulted in an abuse of the process of the Court' restitution can be ordered. This decision would be relevant, only if any mistake. had been committed; but in the instant case, there was only a failure to exercise jurisdiction vested in the authority.

13. *V. Usman* v. *Muthukrishnan*[3], is relied upon by the counsel for the fourth respondent for the purpose of showing that even a quasi-judicial authority exercising powers under Act XVIII of 1960 has the jurisdiction to rectify mistaken committed by the Rent Controller. In construing any of the sections of the enactments passed by the Tamil Nadu Legislature, provisions of the Tamil Nadu General Clauses Act, (I of 1891) would be applicable. Section 13 is to the following effect:—

> "13. When powers or duties to be exercised and performed:—
>
> Where an Act confers a power or imposes a duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires".

Hence, when a power is conferred on the Authority, he has to perform it from time to time, 'as occasion requires'. Section 7 of Act X of 1969 says that it is open to the authority to pass orders as 'he may think fit'. It is not an arbitrary power that could be exercised, but the Revisional Authority is to exercise such powers as spelt out by the Supreme Court in the abovesaid two decisions, by passing considered orders with reasons, both on facts and law. Hence, the order dated 27th July, 1978, being *nonest*, thereafter, he realised that such an order could not be a lawful order, and therefore as the 'occasion required' for the matter to be heard in detail in the presence of both the parties, he issued notices to the petitioner who also willingly responded and participated in the hearing. Having thus exercised the powers lawfully, it will not be proper to hold that the impugned order was passed without jurisdiction or that the order of restoration is against the provisions of the Act and the Rules.

14. Mr. Ramajagadeesan, learned counsel for the petitioner would then contended that the impugned order is in the nature of review, and after six long years, it is not open to respondents 1 to 3 to entertain the petition filed by the 4th respondent. Here again, this point carries no substance, in view of section 4 (1) (*a*) of the Act, which enables a Record Officer to take *suo motu* action, when it appears to him that in respect of any land let for cultivation the landowner has failed to make application for rectification or inclusion under section 3 (6) of the Act. In such contingencies enquiry can be held and orders passed accordingly. Section 3 (6) deals with remedy to rectify any entry found in the draft record, which could be sought by either a landowner, intermediary or tenant. Hence there was ample jurisdiction for respondents 1 to 3 to entertain the petition filed by the 4th respondent herein, for rectification of the entries found in the registers.

15. For the reasons above stated, the points above referred to having been held as against the petitioner, and no other point being canvassed, this petition is dismissed. No costs.

R.S. —— *Petition dismissed.*

1. (1977) 1 S.C.C. 508: (1977) 2 S.C.R. 460: (1977) Tax. L.R. 685: A.I.R. 1977 S.C. 1348.
2. A.I.R. 1969 J. and K. 8.
3. (1978) 1 M.L.J. 10: 90 L.W. 711: A.I.R. 1978 Mad. 158.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

Melur Panchayat Union, through its Commissioner and another ..*Appellants**

v.

L. Sundararajan and others .. *Respondents*.

Civil Procedure Code (V of 1908), section, 92 (1) (h)—Trust to provide food to Byragis and Brahmins—Application to change object into one for educational institution—Application not maintainable.

Held, that the provisions of section 92 (1) (*h*), Civil Procedure Code, do not contemplate the change of the character of the original trust into a different one; all that the said sub-section contemplates is granting such further or other relief as the nature of the case may require and these words do not, under any circumstances mean and include a change or alteration of the very object with which the trust has been created by its author. [*Para. 9.*]

Case referred to:—

Swami Ramji Paramatmanand Saraswathi v. Ramji Tripathi, (1974) 2 S.C.C. 695: (1975) 1 S.C.R. 790: A.I.R. 1974 S.C. 2141.

Appeal against the decree of the Sub-Court, Madurai, dated 25th October, 1976 in O.S. No. 419 of 1973.

C. Chinnaswamy, M. Shakir Ali and *P. Chandrasekharan*, for Appellants.

R. S. Ramanujam and *G. Srinivasan*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiffs 3 and 4 in O.S. No. 419 of 1973 on the file of the III Additional Subordinate Judge, Madurai, against the judgment and decree, dated 25th October, 1976 in the said suit, dismissing the said suit instituted under section 92, Civil Procedure Code.

2. It is unnecessary at this stage to dwell in detail on the case that has been put foward by either side before the trial Court. Because, it is sufficient for the purpose of this appeal if it is only said that the suit had been instituted by all the plaintiffs for changing the object of the trust that had been created by one Ananthanarayana Deekshidar, for providing food to Byragis and Brahmins, into one for an educational institution. It was also opposed by the defendant in the trial Court that inasmuch as the scope of section 92 (1) (*h*) does not contemplate such a kind of transformation of the object of the trust into one something different from the object with which it had been initiated or started by the founder, and what is more, if at all, that is the scope of construction. First of all, the plaintiffs are obliged to prove with adequate evidence that there has been no scope at all to carry on the object of the trust any further, namely, to provide food for Byragis and Brahmins, then only the question of transferring the trust into one for an educational institution that is proposed can be taken into consideration at all.

3. As a matter of fact, the main point urged on behalf of the appellants, namely, plaintiffs 3 and 4 is that Ananthanarayana Deekshidar got the land as an inam from the Nawab of Arcot, though the details relating to the date and the purpose for which the inam was granted by the Nawab of Arcot are not known. It is also not disputed that the trust came into existence for the said purpose. Therefore, it is not now open to have a dispute over the matter especially when it is common ground that the said trust though was not properly being maintained, has lost its character of providing food for Byragis and Brahmins.

4. It is common knowledge that when the founder of a trust has created the same with an object, that object should be continued on the trustees who are administering the properties of the said trust and only on an utter failure and frustration of the object by not being in a position to carry out the object, they can come forward with any petition, if at all, they are maintainable, under section 92 (1) (*h*), Civil

*Appeal No. 899 of 1977. *11th March*, 1981.

Procedure Code. The argument advanced in this regard by Mr.T.R. Rajagopalan, the learned counsel for the respondent herein cannot be rejected as wholly unsustainable, Mr.Chandrasekharan, learned counsel for the appellants, in his interesting argument, no doubt, submits that when the very properties attached to the trust have become so dilapidated and not to a position to be managed or administered as there are no funds even to carry out the repairs, it is but necessary that the provisions of section 92 (1) (*h*) have to be allowed to have their sway for the benefit of the continuance of the trust though by changing its name, and according to the learned counsel, by changing the purpose of the trust from one of educational institution for imparting knowledge to the posterity of this nation, it cannot be said to be in any way against the purpose and aim of the said trust. I have carefully applied my mind to the submissions made in this regard by both the sides. I have also applied my mind and read carefully the provisions of sections 92 of the new Civil Procedure Code, namely the Code of Civil Procedure, 1908, as amended by Act CIV of 1976. Section 92 of the Civil Procedure Code deals with 'Public Charities'. Clause (1) (*h*) of section 92 of the said Code enumerates that a relief such as 'granting such further or other relief as the nature of the case require' can be granted under the provisions of this section by a Court. When a party connected with the trust comes forward with an application and it feels that the purpose of the trust can be enhanced and its continuance can also be allowed for some appreciable period by changing the object, it can be brought under this provision.

5. In the instant case, it is relevant to note that though evidence has been let in on behalf of the plaintiffs, in the second plaintiff examining himself as P.W. 1, and also filing Exhibit A-1 and Exhibit A-2, and on the other side the father of the defendant examining himself us D.W. 1 and also filing Exhibit B-1 to Exhibit B-4, it has not been convincingly brought us to uphold that this section 92 (1) (*h*) can be made use of for the purpose of granting the relief prayed for by the plaintiffs in the suit. Suffice it to say, without going in detail even at this stage, that the trial Court is correct in having come to the conclusion on the two issues framed by it, namely "(1) whether the suit chatram belongs to a private trust and (2) whether this Court has no jurisdiction to try this suit? and holding under issue No. 1, that it is a private trust pure and simple and it cannot be said to be public trust and further holding under issue No. 2 that this Court (the Subordinate Judge's Court, Madurai) has no jurisdiction to try the suit since section 92, Civil Procedure Code, does not contemplate a public trust of charitable nature being considered in a suit arising out of it, and that the plaintiffs are not entitled to the direction prayed for since the direction prayed for by the plaintiffs was not for proper or better administration of the trust for which the chatram building had been created. In the result, the suit was dismissed as mentioned above.

6. On appeal by the plaintiffs 3 and 4 it was vehemently contended by the learned counsel for the appellants and reiterated that even if he is not obliged to put forward any arguments against the finding regarding the first issue by the trial Court, yet, he is obliged to put forward arguments regarding the finding that the Court has got no jurisdiction to try the suit, because, section 92 (1) (*h*), Civil Procedure Code, does not give jurisdiction for it to go into that aspect of the matter.

7. In this regard, the learned counsel for the respondent refers to the decision in *Swami Paramatmanand Saraswathi and another v. RamjiTripathi and another*[1] for the following proposition:

> "A suit under section 92, Civil Procedure Code, is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there was a breach of such trust or that the direction of the Court is necessary for the administration of the trust and the plaintiff must pray for one or more of the reliefs that are mentioned in the section. It is, therefore, clear that if the allegation of breach of trust is not substantiated or that the plaintiff had not made out a case for any direction by the Court for proper administration of the trust, the very foundation of a suit

1. (1974) 2 S.C.C. 695: (1975) S.C.R. 790 A.I.R. 1974 S.C. 2141 at 2144.

under the section would fail, and even *if* all the other ingredients of a suit under section 92 are made out, if it is clear that the plaintiffs are not suing to vindicate the right of the public, but are seeking a declaration of their individual or personal rights of any other person or persons in whom they are interested, then the suit would be outside the scope of section 92."

8. Applying my mind to the observation, of the Supreme Court in the said decision and utilising the *ratioidece ndi* imbedded therein to the facts of the instant case, I am constrained to concur with the finding of the trial Court that the trial Court had got no jurisdiction to entertain the suit as framed and instituted as O.S. No. 419 of 1973, because the averments made in the plaint as well as the points arising for determination in the suit on the basis of the various contentions raised in the written statement do not come within the purview of Clause (1) (*h*) of section 92, Civil Procedure Code. No further discussion is necessary for arriving at this conclusion, because, the observation of the Supreme Court in this regard in the above decision referred to, when applied to the facts of this case, clearly shows that when the plaintiffs want to change the very character of the trust, in other words, to change the very object of the trust and transform the trust which was originally initiated for the purpose of providing food for Byragis and Brahmins into one of an educational institution on the ground that the properties of the said trust have become dilapidated, it can never come under the purview of section 92 (1) (*h*), Civil Procedure Code.

9. Mr. T.R. Rajagopalan, the learned counsel for the respondents, further points out that section 92, Clause (3), Civil Procedure Code, contemplates the application of the doctrine of *cypres* so far as the diversion of the funds to any purpose other than the purpose for which the trust has been created. Originally, before the amending Act CIV of 1976, it is the High Court, which has to be moved with respect to such a prayer or in the moffusil, it is the District Court, which has to be moved for accomplishing that object. Now, inasmuch as this provision is also there under section 92, the scope of section 92 has to be comprehensively understood and what is more, it is not out of place according to him, that it is submitted that section 2 (1) (*h*), Civil Procedure Code, does not contemplate the object for which the suit has been instituted by the plaintiff in the trial Court. The object of the institution of the suit by the plaintiff before the trial Court was to change the very character of the the suit, in that, when originally the donor or the author of the trust had endowed the property for the purpose of feeding the Byragis and Brahmins, the plaintiff now seeks the permission of the Court to change that object into one utilising the funds of that trust for transforming the very chatram, which is the property of the trust into one of an educational institution. The scope, according to the learned counsel for the respondent, Mr. T.R. Rajagopalan is that section 92 is not so wide as to imbibe the aforementioned prayer that has been now put forward by plainliff, the appellant herein. In view of the foregoing discussion and also the evidence available on record, as an appellate Court, I hold that the provision under section 92 (1) (*h*), Civil Procedure Code, does not contemplate the change of the character of the original trust into a different one, but all that, the said sub-section contemplates is granting such further or other relief as the nature of the case may require and these words do not, under any circumstances mean and include the change or alteration of the object with which the trust has been created by its author. Therefore, there is no merit in the appeal. The appeal is dismissed. There is no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

Rama Reddiar ... *Petitioner**

v.

Raja Reddiar ... *Respondent.*

(A) *Tamil Nadu Debt Relief Act (XL of 1979), sections 31 to 33—Suit for half the principal and half the interest—Decreed in terms of Act (XL of 1978)—Act XL of 1979 coming into force — Petition filed for amending the decree — Claim for the remaining half made—Whether bound by section 33 of the Act.*

(B) *Civil Procedure Code (V of 1908), section 115 —Revisional jurisdiction— Interference by High Court against order erroneously denying relief, whether permissible.*

Held: From the scheme of the Tamil Nadu Debt Relief Act it is clear that in all cases where the debt or the decree has not been fully and factually discharged or satisfied, then the application for scaling down such debts or decrees can be made under Act XL of 1979. Such being the scheme of the Act, section 33 of the 1979 Act has to be interpreted against this background and so interpreted it will only mean that only in those cases where the decree passed has been executed and full satisfaction recorded, the bar under section 33 (2) will come into play. In the instant case, as the decree obtained by the petitioner has not been executed and full satisfaction recorded. the bar under section 33 (2) will not operate and the petitioners are entitled to have the decree amended as per the provisions contained in section 16 of the Act. The Revisional jurisdiction of this Court has to be exercised as there is failure of the Court below to exercise jurisdiction under section 16 of the Act XL of 1979. [*Para.* 5.]

Case referred to:—

*Sher Singh (dead) by L. Rs.*v. *Joint Director of Consolidation*, (1978) 3 S.C.R. 982: (1978) 3 S.C.C. 172: A.I.R 1978 S.C. 1341.

Petitions under section 115 of Act V of 1908 praying the High Court, to revise the order of the District Munsif Court, Gingee, dated 20th February, 1980 in I.A. No. 1418 of 1979 and 1337 of 1979 in O.S. No. 349 of 1978 and 347 of 1978, respectively.

B. Kumar, for Petitioner.

K. Sampath, for Respondent.

The Court made the following

ORDER.—The decree-holders are the petitioners, before this Court and the judgment-debtors are the respondents. The petitioners, each filed a suit and obtained a decree on 16th October, 1978 and 5th January, 1979, for half of the principal amount and half of the interest due as per Act XL of 1978. When Act XL of 1978 was repealed by Act XL of 1979 they became entitled to get the full amount of principal and interest due. They, therefore filed petitioners under sections 31 to 33 of Act XL of 1979 to amend the decrees. The trial Court came to the conclusion that when once the decrees are executed or satisfied, the petitioners cannot amend the decrees as per section 33 of Act XL of 1979, and as the petitioner in C.R.P. No. 1122 of 1980 has executed the decree and realised a sum of Rs. 500 on 21st April, 1979, Rs. 300 on 19th June, 1979 and Rs. 4,000 on 2nd July, 1979 and the petitioner in C.R.P. No. 1126 of 1980 has executed the decree and realised a sum of Rs. 100 in E.A. No. 16 of 1979, and a further sum of Rs. 200 in E.A. No. 54 of 1979, the petitioners are barred from filing the present petitions to amend the decrees by virtue of the provision contained in section 33(2). Against that order the petitioners have filed the present civil revision petitions.

2. The learned counsel for the petitioners contended that section 33 (2) will apply only in those cases where the decree has been executed in full or satis fied in full before the date of publication of this Act and as the decrees covered in these civil revision petitions have not been fully executed, the bar under section 33 (2) will not operate.

3. The learned counsel for the respondents, relying on the decision of the Supreme Court in *Sher Singh (dead) by L. Rs* v. *Joint*

*C. R. P. Nos. 1122 and 1126 of 1980. 1*st September*, 1981.

Director of Consolidation[1] contended that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by subordinate Courts and it is not open to this Court, while exercising its jurisdiction under section 115, Civil Procedure Code, to correct errors of fact or even errors of law, unless the errors have relation to the jurisdiction of the Court to try the dispute itself, and as there is no such error of jurisdiction in the order passed by the trial Court, there is no scope for this Court exercising its revisional jurisdiction under section 115, Civil Procedure Code.

4. The petitioners obtained the decrees on 16th October, 1978 and 5th January, 1979 when Act XL of 1978 was in force. In view of the provisions contained in Act XL of 1978 the petitioners were able to get a decree for half of the principal amount and half of the interest due. Act XL of 1978 was repealed by Act XL of 1979 under which the petitioners became entitled to get a decree for the full amount of the principal and the interest due. After the coming into force of Act XL of 1979, the petitioners filed applications for amendment of the decree. The question to be considered is whether the bar under section 33 (2) operates only when the decree has been executed in full or even in those cases where a decree has been executed only partially and some amount has been realised under the decree.

5. Act XL of 1979 received the assent on 11th June, 1979, and was published in the Tamil Nadu Government Gazette on 13th June, 1979. Section 33 (2) provides that every proceeding made or taken and pending before the date of publication of Act XL of 1979 shall abate. In cases where decrees have been passed before the publication of this Act and if it is executed through Court, it should be stayed under section 18 on an application made by the judgment-debtor. After getting stay of the execution of the decree the judgment-debtor should file an application under section 15 for amendment of the decree. The proviso to section 16 stipulates that while amending the decree, all payments made or amounts recovered before or after the date of publication of Act XL of 1979 in respect of the decree shall first be applied in payment of all costs as originally decreed to the creditor. Where the debt has not ripened into a decree, how much debt should be scaled down is provided under section 17. From the scheme of the Act, it is clear that in all those cases where the debt or the decree has not been fully and factually discharged or satisfied, then application for scaling down such debts or decrees can be made under Act XL of 1979. Such being the scheme of the Act, section 33 (2) has to be interpreted against this background and so interpreted, it would only mean that only in those cases where the decree passed has been executed and full satisfaction recorded, the bar under section 33 (2) will come into play. In the instant case, as the decree obtained by the petitioners has not been executed and full satisfaction recorded, the bar under section 33 (2) will not operate and the petitioners are entitled to have the decree amended as per the provisions contained in section 16 of the Act. Revisional jurisdiction of this Court has to be exercised as there is failure of the Court below to exercise jurisdiction under section 16 of the Act XL of 1979.

6. In the result, the civil revision petitions are allowed and the cases are remitted back to the trial Court for amendment of the decrees as provided under Act XL of 1979. Parties to bear their own costs.

R.S. —— *Petitions allowed.*

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1. (1978) 3 S.C.R. 982: (1978) 3 S.C.C. 172; A.I.R. 1978 S.C. 1341.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *G. Ramanujam and R. Sengottuvelan, JJ.*

G. Dhyanand and another ... *Appellants**

v.

Zaamni Bi and others ... *Respondents.*

Motor Vehicles Act (IV of 1939), section 95—Accident caused by rash and negligent driving— Deceased travelling in lorry carrying goods—Claim for compensation by the legal representative of the deceased passenger against the driver, owner, and the Insurance Company—Terms of the policy of Insurance excluding liability in respect of the passenger in the lorry—Claim against the owner and driver alone is tenable.

Held that in the instant case the driver was acting in the course of his employment in carrying the deceased and as such the owner of the lorry is liable. [*Para.* 8.]

But as far as the Insurance Company is concerned the terms of the policy will have to prevail. On a perusal of the policy it is clearly seen that it is nothing but a reproduction of the terms set out in section 95 of the Motor Vehicles Act. The Insurance Company is not liable since the liability in respect of the passenger in the lorry has been specifically excluded by the terms of the policy. [*Para.* 9.]

Cases referred to:—

The Commonwealth Assurance Company Ltd. v. *V. P. Rahim Khan Sahib*, (1971) A.C.J. 295: 84 L.W. 387; *South India Insurance Company Ltd.* v. *P. Subramanian*, (1971) 84 L.W. 571: (1972) A.C.J. 439; *Pushpabai Purushotham Udeshi* v. *M/s. Ranjit Ginning and Pressing Company*, (1977) 2 S.C.J. 442: 1977 A.C.J. 343: (1977) 2 S.C.C. 745: (1977) 3 S.C.R. 372: A.I.R. 1977 S.C. 1735; *Young* v. *Edward Box and Company Ltd.*, (1951) T.L.R. 789; *K. R. Sivagami, Proprietor, Rajendran Tourist* v. *Mahabodh Niss Bi*, (1981) 1 M.L.J. 375: (1981) A.C.J. 399: 94 L.W. 1: A.I.R. 1981 Mad. 138.

*A. A. O. No. 294 of 1979. *27th April*, 1981.

Appeal against the Order of the Motor Accidents Claim Tribunal (District Court) Dharmapuri at Krishnagiri dated, 29th August, 1978 in M. A. C. T. O. P. No. 20 of 1977.

K. C. Jacob and *Raju K. Lucose*, for Appellants.

S. W. Kanakaraj, for Respondents.

The Judgment of the Court was delivered by

Sengottuvelan, J.—One Abdul Jabbar, the husband of the first respondent and the father of respondents 2 to 7, lost his life in a fatal road accident about 12'o clock midnight on 2nd October, 1975, on the Hosur Krishnagiri Road while he was travelling in the lorry MYD. 3425 belonging to the first appellant and insured with the second appellant.

2. The case of the respondents 1 to 7, who are petitioners before the Motor Accidents Claims Tribunal, in M. A. C. T. O. P. No. 20 of 1977, under section 110-A of the Motor Vehicles Act is as follows. The deceased Abdul Jabbar was a sheep merchant and was aged about 50 years at the time of his death. The deceased was travelling in the lorry MYD. 3435 from Bangalore. The lorry was driven by the 8th respondent, herein, and when the lorry was proceeding near Kurubarabelli at about 12'o clock in the midnight on 2nd October, 1975 due to the rash and negligent driving at high speed of the lorry, it capsized and Abdul Jabbar who sat in the cabin met with instantaneous death. The accident took place on account of the rash and negligent driving of the 8th respondent herein. The respondents 1 to 7 claimed compensation of Rs. 30,000 before the Tribunal. The driver of the lorry remained *ex parte*. In the counter statement filed by the lorry owner, who is the first appellant herein before the Tribunal, the allegation that the lorry was driven at a high speed and in a rash and negligent manner was denied. He attributed the accident to the mechanical defect in the lorry. He also contended that the driver was directed not to carry any passenger in the lorry and as such the driver had acted beyond the course of employment and taken the deceased passenger in the vehicle for which the lorry owner cannot be held liable. In any event, the deceased was not a fare-paying passenger and the Insurance Company is also liable in terms of the insurance policy. It was also contended that the

compensation claimed is excessive. In a separate counter-statement, the Insurance company, the second appellant herein, denied the allegation that the lorry was insured so as to cover the liability of the deceased passenger and the age, income and occupation of the deceased passenger were also disputed by the Insurance Company. The Insurance Company also contended that in any event, the compensation claimed is high and exaggerated. On these pleadings, the Tribunal framed the following points for determination:

"1. Whether the accident took place on account of the rash and negligent driving of the lorry MYD. 3425 by the first respondent?

2. What is the amount of compensation to be awarded?"

3. On behalf of the claimants the first respondent was examined as P.W. 1, and P.W. 2 (*sic*) one C. Venkatappan, an eye witness to the accident was also examined on behalf of the claimants to prove that the lorry was driven by the driver, the 8th respondent herein, at a high speed and in a rash and negligent manner resulting in the death of the deceased. The claimants also filed the certified copy of the judgment in C.C.No.164 of 1976, on the file of the Chief Judicial Magistrate, Dharmapuri at Krishnagiri, in which the driver admitted his guilt before the criminal Court and was duly convicted and sentenced on the charge of rash and negligent driving. On this evidence, the Tribunal came to the conclusion that the accident occurred on account of the rash and negligent driving of the lorry MYD.3425 by the driver. In the grounds of appeal the finding of the Tribunal that the lorry was driven in a rash and negligent manner by the driver is not challenged. The main grounds taken by the appellants in this civil miscellaneous appeal are as follows:

"1. The Tribunal erred in not taking note of the provisions (*i*) (*c*) and (*ii*) of section 95 (1) (*b*), which state that there need not be any policy to cover any liability in relation to a person carried in a goods vehicle.

2. TheTribnnal ought to have held that the deceased being carried in the lorry was not a third party on whose behalf a claim could be preferred against the Insurance Company.

3. The Tribunal ought to have held that there is no privity of contract between the claimants and the Insurance Company.

4. In any event, the compensation awarded is excessive."

4. Hence the liability of the owner of the lorry and the Insurance Company in respect of the death of a third party passenger in the lorry MYD. 3425 will have to be decided. In this case there is evidence to show that the deceased was the owner of the goods carried in the abovesaid lorry. Section 95 of the Motor Vehicles Act dealing with the requirements of policies and the limits of liability is set out hereunder.

"In order to comply with the requiremens of this Chapter, a policy of insurance must be a policy which (*a*) is issued by a person who is an authorised insurer (or by a Co-operative Society allowed under section 108 to transact the businessof an insurer), and (*b*) Insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in repsect of the death or bodily injury to any person caused by or arising out of the use of the vehicle in a public place. Providedthat apo'icy shall not be required—

(*i*) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923, in respect of the death of or bodily injury to, any such employee—

(*a*) engaged in driving the vehicle; or

(*b*) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle; or

(*c*) if it is a goods vehicle, being carried in the vehicle; or

> (*ii*) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises."

Under proviso (1) to section 95 of the Motor Vehicles Act a policy shall not be required to cover liability in respect of the death of a person or a passenger being carried in the vehicle if it is a goods vehicle except in so far as is necessary to meet the requirements in relation to a liability under the Workmen's Compensation Act, 1923. Rule 261 of the Madras Motor Rules is as follows:—

> "No person shall be carried in the cab of the goods vehicle beyond the number of which there is seating accommodation at the rate of 38 centimetres measured along the seat, excluding the space reserved for the driver, for each person and not more than six persons in all in addition to the driver shall be carried in any goods vehicle.".

Relying on this rule an argument is advanced that there is no prohibition of carrying of passengers in the cabin of the lorry within the prescribed limits.

5. In the case reported in *The Commonwealth Assurance Company Limited* v. *V.P. Rahim Khau Sahib and others*[1] a single Judge of this Court came to the conclusion that in the case of passengers carried in a goods vehicle the Insurance Company is liable to pay compensation only in respect of the death of or bodily injury to such passengers who are carried in the vehicle by reason of or in pursuance of the contract of employment. An owner of goods accompanying the goods in a truck cannot be said to be travelling in the truck by virtue of any such contract. In the case reported in *South India Insurance Company Limited v. P. Subramaniam and others*[2] to which one of us was a party, this Court came to the conclusion that in the case of an owner of the goods accompanying the goods there is no contract of employment between the owner of the goods and the owner of the lorry. It was also held that even if it is taken that the words 'contract of employment' referred to in the second proviso to section 95 (1) (*b*) would include not only the employee of the insured but also the employees of the owner of the goods, an owner of the goods travelling in the lorry cannot be said to be doing so by reason of or in pursuance of any contract of employment, for, there is no such employment as such a case. Taking this view the terms of the Insurance policy were held not to extend to any liability arising out of the owner of the goods travelling in the lorry and the Insurance company were held to be not liable to pay compensation.

1. (1971) A.C.J. 295: 84 L.W. 387.
2. (1971) 84 L.W. 571; (1972) A.C.J. 439.

6. In the case reported in *Pushpabai Purushotham Udeshi and others* v. *Mrs. Ranjit Ginning and Pressing Company and others*[1] the Supreme Court had occasion to consider the claim for compensation in respect of a passenger permitted to travel with the Manager of the company in the car which met with an accident resulting in the death of the passenger. The High Courtof Madhya Pradesh found that there is no evidence to show that the owner of the vehicle was aware that the passenger was taken by the Manager and that under the the circumstances he owner cannot be held liable for the tortions act committed by his servant. The High Court found that the car was going from Nagpur to Pandhurna on the business of the company and it may also be that the Manager of the owner's car, was also going on thebusiness the owner and it may also be that he had the implied authority to drvie the vehicle. Having agreed with the contentionof the claimants, the Madhya Pradesh High Court came to the conclusion that there were no pleadings or material on record to establish that the deceased was travelling in the vehicle either on some business of the owner of the vehicle or under any ostensible authority from them to their Manager to take the deceased as a passenger in the vehicle. A reference was made in the judgment of the Supreme Court to the observation by Lord Justice Denning in the case reported in *Young v. Edward Box and Company Limited*[2] as follows—

> "......the first question is to see whetherthe servant was liable; if the answer is yes, the second question is to see whether the emplo-

1. (1977) 2 S.C.C: 745: (1977) 3 S.C.R. 372 (1977) 2 S.C.J. 442: (1977) A.C.J. 343: A.I.R. 1977 S.C. 1735.
2. (1951) T.L.R. 782.

> yer must shoulder the servant's liability. So far as the driver is concerned, his liability depends on whether the plaintiff was on the lorry with his consent or not.....The next question is how far the employers are liable for their servant's conduct. In order to make the employer liable to the passengers it is not sufficient that they should be liable for their servants negligence in driving. They must also be responsible for, his conduct in giving the man a lift. If the servant has been forbidden, or is unauthorised, to give anyone a lift, then no doubt the passenger is a trespasser on the lorry so far as the owners are concerned; but that is not of itself an answer to the claim......In my opinion, when the owner of the lorry sends his servant on a journey with it, thereby putting the servant in a position not only to drive it, but also to give people a lift in it, then he is answerable for the manner in which the servant conducts himself on the journey not only in the driving of it but also in giving lifts in it, provided, of course, that in so doing the servant is acting in the course of his employment.

Lord Justice Denning concluded by observing that the passenger was therefore, a trespasser, so far as the employers were concerned, but nevertheless the driver was acting in the course of his employment, and that is sufficient to make the employer liable. Relying on the decision and on the ostensible authority of the manager as a licencee to permit the deceased to travel with him, the Supreme Court held that the manager was acting in the course of his employment in giving leave to the deceased to travel with him and that the owner of vehicle is liable. In deciding the liability of the Insurance Company, the Supreme Court after referring to section 95 of the Motor Vehicles Act as amended by Act LVI of 1969, held that the insurance cover is not available to passengers in a case like the present one and that the proviso to sub-section (*ii*) provides that a policy shall not be required except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises.

7. In the case reported in *K.R. Sivagami, proprietor Rajendran Tourist v. Mahabobh Niss Bi and others*[1] a Division Bench of this Court. to which one of us was a party, in dealing with a case of a driver of a taxi carrying more than the permitted load of passengers which is contrary to the conditions of permit under which the vehicle was allowed to be used as a tourist taxi, held that the non-observance of the rules relating to the number of passengers to be carried can only be said to be an improper performance of the driver's duty. Even assuming that the permit conditions not to take more than the permitted number of passengers is a prohibition, limitation or restriction, that relates only to the manner of performance of the driver's duties in the course of his employment and that cannot in any way limit the sphere of employment. Therefore, the carrying of two excess passengers by the driver of the taxi will only amount to an improper performance of his duties as a driver of the taxi and therefore it cannot be taken to be outside the sphere of his employment. It held that the owner of the taxi is vicariously liable for the tort committed by the driver of his taxi. In *United India Fire and General Insurance Company Limited, Madurai v. M.S. Durairaj and others*[2] this Bench had occasion to consider a case where a senior clerk of the State Bank of India, Kodaikanal, while he was returning from Madurai to Kodaikanal in a car MDA 1194, met with an accident resulting in injuries to the said clerk. In regard to the claim for compensation by the injured clerk an objection was taken by the Insurance company that the injured was carried for hire which is against the terms of the Insurance policy and as such the insurer was not liable. Following the judgment of the Supreme Court reported in *Pushpabai Purushotham Udeshi and others* v. *Messrs Ranjit Ginning & Pressing Company and another*[3] referred to supra, this Court negatived the liability of the insurance company.

8. Adopting the principles laid down in the decisions cited above there is no difficulty in coming to the conclusion that the driver was acting in the course of his employment in carrying the deceased and as such the owner of the lorry is liable.

9. But as far as the Insurance Company is concerned, the terms of the policy will have

1. (1981) 1 M.L.J. 375: 95 L.W. 1: (1981) A.C.J 399: A.I.R. 1981 Mad. 138.
2. C.M.A. No. 78 of 1978.
3. (1977) 2 S.C.J. 442: (1977) A.C.J. 343.

to prevail. The policy is marked as Exhibit B-1. On a perusal of the policy it is seen that it is nothing but a reproduction of the terms set out in section 95 of the Motor Vehicles Act. Following the view expressed in the decisions referred to above interpreting similar clauses in the policy of insurance, we have no hesitation in holding that the second appellant, Insurance Company is not liable since the liability in respect of the passenger in the lorry has been specifically excluded by the terms of the policy.

10. In the grounds of appeal it is also stated that the amount awarded is excessive. We have the evidence of P.W. 1, the first petitioner before the Tribunal, to show that the deceased was doing sheep skin business and was earning Rs. 400 per month. According to P.W. 1, he was paying her a sum of Rs. 300 per month for family expenses. The deceased was aged 50 years at the time of his death. On the materials the Tribunal by computing the lifespan of the deceased at 65 years and on that basis the deceased could have contributed Rs. 1,200 per annum to the family arrived at the amount of compensation at Rs. 18,000 towards the loss of support. Further a sum of Rs. 4,000 was added towards the loss of expectation of life. Deducting a sum of Rs. 2,000 towards uncertainties of life a sum of Rs. 20,000 was awarded as compensation. The assessment of compensation by the Tribunal is not shown to be wrong under the circumstances of the case. Hence the plea that the quantum of compensation awarded is excessive will have to be negatived.

11. In view of the above discussion, the appeal in so far as the first appellant, viz., the owner of the lorry is concerned, is dismissed and the appeal by the second appellant, viz., the Origent Fire and General Insurance Company Limited, is allowed. However there will be no order as to costs.

R. S. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan and S. Padmanabhan, JJ.*

M. A. Rajarathnam ... *Petitioner**

v.

J. Rajammal ... *Respondents.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960) *as amended by Act (XXIII of* 1973) *section* 25 (2) *Proviso—Revision to High Court against order of Appellate Authority—Time taken for obtaining certified copy—Exclusion—Permissible.*

(B) *Limitation Act (XXXVI of* 1963), *sections* 12 (2) *and* 29—*Applicability.*

Held, that the time taken by the revision petitioner for obtaining the certified copies of the Appellate Authority's order must be excluded in calculating the period of limitation under section 25 (2) of the Rent Control Act having regard to the insistence by the Appellate Side Rules that in order to be a proper presentation any memorandum of revision petition has got to be accompanied by a certified copy of the order sought to be revised, and also having regard to the provisions of the Rent Control Act and Rules. Taking note of the express provision made in section 23 (1) (*b*) of the Act as well as the provision in the Rules for applying for, and obtaining, certified copies of the order, one cannot read into the scheme of the Act any intention to exclude the provision of section 12 (3) of the Limitation Act from being operative for the purposes of limitation under section 25 of the Act. [*Para.* 9.]

Cases referred to:—

Hukum dev v. *Lalit Narain*, (1974) 2 S.C.C. 133: (1974) 3 S.C.R. 31: A.I.R. 1974 S.C. 480; *Sivaprakasam* v. *Radhakrishnan*, (1975) T.L.N.J. 328; *Rakku* v. *Vasanthalakshmi*, (1975) 2 M.L.J. (N.R.C.) 19.

*C. M. P. No. 6569 of 1981 in C. R. P. S. R. No 57927 of 1981. *19th November, 1981.*

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to condone the delay of 12 days in filing C. R. P. in S. R. No. 57927 of 1981, sought to be preferred to the High Court to revise the judgment in C. M. A. No. 1 of 1980, Principal Sub-Court, Tuticorin, dated 17th February, 1981 confirming the eviction order passed in R. C. O. P. No. 143 of 1977, dated 29th November, 1979, District Munsif Court, Tuticorin.

V. Krishnamurthi, for Petitioner.

K. G. Rajappa, for Respondent.

The order of the Court was made by

Balasubrahmanyan, J.— This case comes before us on a reference by Swamikannu, J. The question is whether in a revision filed under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960, the revision petitioner is entitled to exclude the time taken for obtaining a certified copy of the order of the Appellate Authority for purposes of limitation. Since the learned Judge felt some difficulty in the matter, he referred the question to be decided by a Bench.

2. Under the scheme of the Tamil Nadu (Buildings Lease and Rent Control) Act, 1960 (hereinafter referred to as the Rent Control Act), proceedings in the first instance are heard and determined by the Rent Controller. Against any order passed by the Rent Controller, section 23 of the Rent Control Act provides for an appeal to an Appellate Authority. From an order passed by an Appellate Authority, a revision lies to this Court under section 25 of the Rent Control Act. It has been held by the Supreme Court in a recent decision that notwithstanding the wide language used in describing the power of revision of the High Court under section 25 of the Act, that, in essence, is only a revisional jurisdiction and not an appellate jurisdiction. Section 25 (2) provides for a period of limitation within which a revision petition can be filed before this Court. The same section also provides for a limited jurisdiction in the High Court to allow further time under certain circumstances. The provisions regarding limitation in section 25, are cast in the following words:

"25 (2). Every application to the High Court for the exercise of its power under sub-section (1) shall be preferred within one month from the date on which the order or proceeding to which the application relates is communicated to the applicant:

Provided that the High Court may, in its discretion, allow further time not exceeding one month for the filing of any such application if it is satisfied that the applicant had sufficient cause for not preferring the application within the time specified in this sub-section."

The period of limitation prescribed in section 25 (2) is one month from the date on which the Appellate Authority's order is communicated to the revision petitioner. The question is whether in calculating the period of one month the revision petitioner is entitled to exclude the time taken by him for obtaining a certified copy of the order of the Appellate Authority which is sought to be subjected to revision.

3. There is no express provision in section 25 of the Act which provides for exclusion of the time taken for obtaining a certified copy. We may, however, refer to rule 24 of the statutory rules, called the Tamil Nadu (Buildings (Lease and Rent Control) Rules, 1974, governing the procedure for furnishing certified copies. This rule lays down that any person affected by any order passed by the Appellate Authority acting under section 23 of the Act shall be entitled to be furnished with a copy thereof duly certified by the Appellate Authority on application. The rule further provides that the Civil Rules of Practice and Circular Orders made by the High Court in regard to the making of applications and the grant of certified copies shall so far as may be, apply to any applications filed and the grant of any copies to be furnished by the Appellate Authority under the Act.

4. It is convenient, at this stage, to refer to the procedure which has been prescribed by the Appellate Side Rules of this Court for proceedings in revision. Order 4, rule 21 of the Appellate Side Rules, 1965, provides that civil revision petitions under section 115 of the Civil Procedure Code or *any other enactment* shall be accompanied among other things, by a certified copy of the decree or order which is to be revised and a certified copy of the judgment, if any, on which the decree is based as well as a certified copy of the judgment or

order, if any, of the Court or Tribunal of the first instance.

5. It is, therefore, clear from the Rent Control Act and the Appellate Side Rules that there is not only a provision for obtaining certified copies of the order of the Appellate Authority, but a revision to the High Court would not be regarded as having been properly presented unless the revision petition is accompanied by a certified copy of the order sought to be revised. In these circumstances, and in the absence of any express provision in section 25 (2) of the Rent Control Act, providing for exclusion of time for obtaining certified copies, the question is whether such time can be excluded for purposes of calculating the limitation for filing a revision petition. This question has got to be examined in the light of section 29 (2) of the Limitation Act, 1968. This provision lays down that where any special or local law prescribes for suit, appeal or application a period of limitation different from the period prescribed by the Schedule, then those special periods of limitation shall be dealt with as if they were incorporated in the schedule to the Limitation Act. Section 29 (2) further provides that in computing the special period of limitation provided for under any special or local law, the provisions contained in sections 4 to 24 of the Limitation Act shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law.

6. The inquiry under section 29 (2) of the Limitation Act would therefore be to find out whether the limitation provisions in any enactment other than the Limitation Act can be regarded as limitation provisions in a "special' or 'local' Act. The next part of the inquiry would be to find out if in that special or local Act, there is any express provision excluding the applicability of sections 4 to 24 of the Limitation Act. If there is no express exclusion, then the special periods of limitation under the special or local law must be computed by applying sections 4 to 24 of the Limitation Act wherever applicable.

7. At one time the provisions of section 29 (2) of the Limitation Act, 1963, and the comparable provisions in the earlier Indian Limitation Act, 1908 were construed to mean that there must be an express exclusion in the special or local law of sections 4 to 24 of the Limitation Act; otherwise, in the absence of any express exclusion, those provisions will automatically apply to the special or local law concerned. The Supreme Court in *Hukumdev* v. *Lalit Narain*[1] however held that even in cases where a special or local law does not contain express words of exclusion of sections 2 to 24 of the Limitation Act, yet those sections can be excluded by necessary intendement, on a construction of the scheme of the special or local Act, the nature of the provisions contained therein, and their subject-matter.

8. We have already observed that in this case section 25 of the Rent Control Act does not expressly exclude the provisions of sections 4 to 24 of the Limitation Act from being applicable in the matter of computing the period of limitation for filing revision petitions to the High Court against the order of the Appellate Authority. Amongst the group of sections 4 to 24 of the Limitation Act, section 12 deals with exclusion of time in legal proceedings. Sub-section (2) of this section enacts that in computing the period of limitation fur a revision, the date on which the judgment complained of was pronounced and the time requisite for obtaining a certified copy of the decree or order sought to be revised shall be excluded. The question is whether under the particular scheme of the Rent Control Act, it could be said that section 12 (2) of the Limitation Act stands excluded from application.

9. It would be useful, in this context, to refer to section 23 of the Act which provides for an appeal from the Rent Controller's order as well prescribes a time-limit filing the appeal. Section 23 (1) (*b*) of the Rent Control Act provides for the period of limitation for filing an appeal in the following terms—

> "Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of such order, prefer an appeal in writing to the Appellate Authority having jurisdiction.
>
> In computing the fifteen days aforesaid' the time to obtain a certified copy of the order appealed against shall be exclude."

This provision gives an indication that it is not either the policy or the scheme to the Act to ignore the time requisite for

1. (1974) 2 S.C.C. 133: (1974) 3 S.C.R. 31: A.I.R. 1974 S.C. 480.

that there must be an express exclusion in obtaining a certified copy of the order for the purpose of reckoning the limitation period for filing an appeal. On the contrary, express provision is made for not counting the time for obtaining certified copy of the order. This provision is an indication, in our judgment, to show that it is not the purpose or intention of the scheme behind the Act to ignore the time taken by the party to obtain a certified copy of the order which is passed against him for the purpose of enabling him to pursue further proceedings available to him under the Statute. We have earlier observed that under the scheme of the Rent Control Act, the authority who has to pass orders in the first instance is the Rent Controller, followed by an Appellate Authority having appellate powers over whom the High Court is invested with powers of revision. In the face of this statutory hierarchy of authorities having control over the proceedings under the Act, it would be too much to hold that it was the intention of the Legislature not to take note of the time taken for obtaining certified copies of orders passed by each of these authorities for the purpose of further proceedings. The Rules passed under the Rent Control Act relating to the application for, and furnishing of, certified copies of orders of the Rent Controller and of the Appellate Authority have been framed by the State Government in exercise of the rule-making power conferred on them under section 34 of the Act. The power has been granted generally for carrying out the purpose of the Act. Sub-section (5) of section 34 indicates that the Rules framed under the Act by the State Legislature have equal force with the provisions of the Act, since provision is made for amendment of the Rules by the Legislature. Taking note of the express provision made in section 23 (1) (*b*) of the Act as well as the provision in the Rules for applying for, and obtaining, certified copies of the order, we cannot read into the scheme of the Act any intention to exclude the provisions of section 12 (3) of the Limitation Act from being operative for the purposes of limitation under section 25 of the Act. We cannot imagine that the Legislature intended to apply one standard for an appeal, and quite a different standard for a revision under the Act. We may further observe that under the Rules framed under the Rent Control Act governing the procedure for appeals before the Appellate Authority it is laid down that any appeal filed before the Appellate Authority shall be accompanied by a copy of the order of the Rent Controller appealed from. Apparently, this was the reason why the Rules also provide for the application for and furnishing of certified copies. The Rules made under the Act do not expressly provide for the procedure to be followed in the case of petitions for revision under section 25 of the Act. The Rules are silent on the subject. This is clear indication that the Appellate Side Rules of the High Court will have to be applied, as governing the procedure for filing revisions under section 25 of the Act. To this extent, at any rate, the Rent Control Act and Rules are not a self-contained Code. We have earlier referred to the language of Order 4, rule 21 of the Appellate Side Rules which regulate not only revisions filed under section 115, Civil Procedure Code, but also revision petitions filed under any other eanctment. Having regard to the insistence by the Appellate Side Rules that in order to be a proper presentation, any memorandum of revision petition has got to be accompanied by a certified copy of the order sought to be revised, and also having regard to the provisions of the Rent Control Act and Rules which we have refered to above, we are satisfied that the time taken by the revision petitioner for obtaining the certified copies of the appellate authority's order must be excluded in calculating the period of limitation under section 25 (2) of the Rent Control Act.

10. Mr. K.C. Rajappa, learned counsel for the respondent, submitted that section 12 of the Limitation Act cannot be invoked for the purpose of computing the limitation under section 25 (2) of the Rent Control Act, because section 25 (2) itself lays down that the limitation period must be reckoned not from the date of the order, but from the date on which the order is 'communicated to the applicant'. For construing this phrase, learned counsel relied on two judgments of two learned single Judges of this Court. They are reported in *Sivaprakasam and*

others v. *Radhakrishnan and another*[1] and *Rakku* v. *Vasanthalakshmi*.[2] Both the decisions hold that the date of pronouncement of the order is also the date of communication of the order within the meaning of section 25 (2) of the Act. It is unnecessary for purpose of the present discussion to consider whether the interpretation placed by the learned Judges on the expression 'communicated' occurring in section 25 (2) of the Rent Control Act is or is not correct. For, the inquiry in the present revision is whether section 12 of the Limitation Act can be invoked for the purpose of calculating the period of limitation under section 25 (2) of the Act. In our judgment, for purposes of section 12 (2) of the Limitation Act it does not matter if the date of the communication of the order is equated to the date of pronouncement of the order.

11. We may now refer to the particular facts and circumstances in the instant case which have given rise to this reference by Swamikkannu, J. It appears from the record that the order of the Appellate Authority was made on 17th February, 1981. The revision petitioner applied for a certified copy of that order on 26th February, 1981. The copy was made ready on 22nd May, 1981. By this time the Courts had closed for the summer vacation. The petitioner actually filed the revision in this Court on 22nd June, 1981. The contention of the learned counsel for the revision petitioner is that although on the date of filing the revision petition the limitation period of 30 days had expired, still he is entitled to invoke the proviso to section 25 (2) of the Rent Control Act and invoke the discretion of this Court for condoning the delay. It may be observed that this proviso put a ceiling on the power of this Court when it lays down that in no case shall the High Court extend the time beyond the period of 30 days from the end of the time-limit of one month fixed under section 25 of the Rent Control Act. In this case, however, it is common ground that if the time taken for obtaining certified copies is excluded by applying section 12 of the Limitation Act, then the further delay which the revision petitioner asks this Court to condone is within the period of 30 days laid down in the proviso to section 25 (2) of the Rent Control Act. The objection of Mr. Rajappa is based on a different calculation. If section 12 of the Limitation Act is held not applicable, then, the filing of the application on 26th February, 1981, would exceed an aggregate of 60 days from the date of the order passed by the Appellate Authority. In that event according to Mr. Rajappa, the revision would be irredeemably barred by time. In the view we have held that section 12 of the Limitation Act must be applied to petitions for revision under section 25 (2) of the Rent Control Act, the question of the condoning the delay in excess of 30 days does not arise. The delay, on such calculation, would be only 12 days.

12. We did not hear much of argument from Mr. Rajappa on the question as to whether there was really sufficient cause for the 12 days delay which had occurred when the revision petitioner filed this revision on 22nd June, 1981. In the affidavit in support of the petition the revision petitioner represents that he was engaged in celebrating his nephew's marriage on the 11th June, 1981, at Tuticorin and immediately after the marriage because of ill-health which got aggravated by his exertions during the wedding, he had to undergo treatment under a medical practitioner. A certificate from the medical practitioner is part of the record. The explanation of the petitioner was that in his bad state of health, he could not undertake the long journey to Madras to hand over the papers to a lawyer for the purpose of filing the revision. We are satisfied that the explanation furnished by the petitioner for the delay of 12 days provides sufficient cause within the meaning of the proviso to section 25 (2) of the Rent Control Act.

13. In the result, C. M. P. No. 6569 of 1981 is allowed. The Civil Revision Petition will be numbered and posted and dealt with in the usual course.

R.S. ——— *Petition allowed.*

1. (1975) T.L.N.J. 328.
2. (1975) 2 M.L.J. (S.N.) 19.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. N. Singaravelu, J.*

A. Soundarapandian Nadar .. *Petitioner**

v.

S. Madasamy Mudaliar and another. .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 8—Tenant sending rent by money order to landlord—Landlord refusing to receive it continuously—Tenant depositing amount in Bank but not in the name of the landlord—Whether tenant committed wilful default.

Held, that in the present case, the tenant had been remitting the rent by money order, month after month, and finally resorted to deposit of the amount in the bank when the landlord refused to receive money orders. He no doubt deposited the money in his own name. If the pass book is received in evidence, it will certainly throw further light on the question whether the default was wilful or otherwise. On the facts and circumstances of the case, a further opportunity can be given to the tenant to prove his *bona fides*. The reception of additional evidence, namely the pass book, should be done only on terms, since the tenant had sufficient opportunity earlier to produce the same before the Rent Controller and he did not take diligent steps to have it marked, though he had produced the same before the Appellate Authority. [*Paras.* 5 *and* 6.]

Case referred to:—

Thaiyal Nayaki v. *Ayyavu Chettiar*, (1976) 1 M.L.J. (Sh.N.) 15.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), praying the High Court to revise the decree of the Court of the Subordinate Judge, Nagercoil, dated 19th September, 1979 and made in H.R.A. No. 10 of 1979 (H.R.C. No. 80 of 1978, on the file of the Court of the Rent Controller, Nagercoil.

M. Kalyanasundaram, for Petitioner.

K. Ramaswami and *W. M. Abdul Kalam*, for Respondent.

The Court delivered the following

JUDGMENT.—This is a revision petition directed against the order of eviction passed by the Rent Controller and confirmed by the Appellate Authority. The respondent-landlords filed the petition for eviction of the petitioner-tenant on three grounds, namely, wilful default in payment of rent, subletting the premises and requirement for their own use and occupation. The Rent Controller accepted the plea that there was wilful default, but rejected the other two grounds and ordered eviction on the first ground. The Appellate Authority has confirmed the finding with reference to wilful default and dismissed the appeal preferred by the tenant. Hence the revision.

2. The point that arises for consideration is whether the tenant has committed wilful default in payment of rent. The rent for the premises is Rs. 175 per mensem and the tenancy commenced on 1st June, 1974. It is common ground that the tenant paid a heavy advance of Rs. 5,240 and later, a sum of Rs. 2,000 out of the advance was repaid for the purpose of electrification and making improvements in respect of the building. It was agreed that the balance was to be adjusted at the rate of Rs. 50/- per mensem in the rent and the tenant was liable to pay only Rs. 125 per mensem as rent after such adjustment. Accordingly from 10th June, 1974, a sum of Rs. 50 has been adjusted in the rent payable. These facts are not in dispute.

3. It is urged by the landlords that the tenant failed to pay rent from 1st December, 1976, and that the default is wilful. Admittedly, the rent was regularly paid till April, 1976 and, on the own showing of the landlords, the rent from December, 1976 has not been paid. The defence of the tenant is this: Under Exhibit B-1 money order receipt, he sent rent for the month of June, 1976 but the landlords refused the same. Then, the tenant sent the rents for May, June and July, 1976, by money order under Exhibit B-3 which was also refused.

* C.R.P. No. 85 of 1980. 27th October, 1981.

Thereupon, the tenant sent the rent for May, 1976 till August, 1976, by money order under Exhibit B-4, which was also refused. However, the landlords chose to accept one money order sent under Exhibt B-5. Later, the tenant sent the rent for December, 1976 and January, 1977 by money order and the same was not accepted — *vide* Exhibit B-7 which is the money order coupon for the remittances of rent for the months from December, 1976 to May, 1977. This was also refused. Exhibit B-9 shows that the rent for the period June to August, 1977 was also tendered and it was not accepted.

4. Thus, it is urged on behalf of the tenant that the tenant thereafter deposited the monthly rent in the Canara Bank from September, 1977 onwards and he had produced the pass book for perusal before the Appellate Court. The request for reception of the pass bock as additional evidence was rejected on a technical ground, since there was no proper application for receiving the same. However, the Appellate Authority seems to have perused the pass book during the course of arguments, but did not choose to receive the same as additional evidence. The said pass book was referred to in this Court also, though it is not marked. Learned counsel for the tenant urged that this document will clinch the matter and establish that there is no wilful default on the part of the tenant. There is some force in this argument.

5. Learned counsel for the landlords contended that even if the pass book is allowed to be received in evidence, it will only show that the tenant has been depositing the rents in Canara Bank in his own name and not in the name of the landlords. In other words, it is urged that this is not sufficient compliance of section 8 of Act (XVIII of 1960). In reply, learned counsel for the tenant placed before me a ruling of this Court in *Thaiyal Nayaki* v. *Ayyavu Chettiar*[1] and contended that the tenant has substantially complied with the requirements of law and therefore it is enough for the purpose of holding that there is no wilful default. This short notes case is very apposite to the facts of our case. In that case, the tenant sent the rent by money order which was refused by the landlord. The tenant thereafter made another remittance by money order which was also rejected. Thereupon, for the subsequent months, the tenant opened an account in the post-office and deposited the rent every month, but the tenant did not adopt the procedure prescribed by section 8 (2) of the Act. On these facts, Ramaprasada Rao, J., *as he then was*, held that the non-adoption of the procedure prescribed under section 8 (2) of the Act does not throw any light upon want of *bona fides* of the tenant and that, far from proving any wilfulness to avoid the obligation to pay rent, the course adopted by the tenant established her *bona fides*. It was further observed in that case, that the procedure prescribed under section 8 (2) of the Act is only optional and not mandatory and that the tenant has respected the law and her obligation by depositing monthly rents in a Post Office, thus proving that she was at all times willing to pay the rents to the landlord. In the result, the eviction petition was dismissed holding that the default was not wilful. In the present case also, the tenant has been remitting rents by money orders month after month and finally resorted to deposit the amount in the bank when the landlords refused to receive the money orders; of course, he had deposited the money in his own name. However, if the pass book is received in evidence, it will certainly throw further light on the question whether the default was wilful or otherwise.

6. Learned counsel for the tenant therefore requests that the matter may be remanded to the Rent Controller for receiving the pass book as additional evidence. I am satisfied that, on the facts and in the circumstances of the case, a further opportunity can be given to the tenant to prove his *bona fide*. But then, the reception of additional evidence, namely the pass book, should be only on terms, since the tenant had sufficient opportunity to produce the same before the Rent Controller and he did not take diligent steps to have it marked, though he has produced the same before the Appellate Authority. In this view of the matter I

1. (1976) 1 M.L.J. (Sh.N.) 15.

direct the tenant to pay Rs. 150 (Rupees One hundred and fifty only) as costs to the other side before exhibiting the pass book as additional evidence before the Rent Controller.

7. One other factor deserves mention. It is noticed that the landlords put forward three grounds for eviction out of which two grounds, namely, subletting, the requirement of the premises for demolition and reconstruction, have been knocked out, and the Rent Controller has observed that those two grounds are frivolous and untenable. This only indicates that the landlords had put forward even far-fetched grounds for evicting the tenant. Be that as it may, there is only one ground now before us, namely wilful default in payment of rent, and an important piece of evidence *viz.*, the pass book has not been exhibited or received in evidence.

8. The result of my discussion is, the order of eviction passed by the lower Courts is set aside and the matter is remanded back to the Rent Controller for the purpose of receiving the pass book as additional evidence on application by the tenant and on his paying costs of Rs. 150 to the landlords before the Rent Control Court. Both parties will be at liberty to let in evidence on this limited aspect and the matter will be disposed of according to law. The revision petition is ordered accordingly. No costs.

9. The Rent Controller will take up the matter and dispose it of expeditiously, preferably within three months from the date of receipt of the records.

R.S. — *Revision petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *P. Venugopal, J.*

Zaibunissa Bivi .. *Petitioner**

v.

The Madras State Wakf Board, Madras represented by its Secretary .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 5, *rule* 17—*Affixture of notice at the place of residence of the defendant—Sufficiency of service—Presumption.*

Service of summons by affixture at the place of residence is one of the recognised modes of service of summons on a defendant. If the Court records show that there has been service of summons on the petitioner by affixture at his residence, it must be presumed that all the requirements necessary for service by affixture existed in the instant case and there was compliance of all the statutory requirements for effecting such service on the petitioner, and thereafter it is for the petitioner to rebut the presumption. The petitioner in the instant case has not placed any material to rebut the presumption. If really there was no service of suit summons on the petitioner she need not have filed I. A. No. 1342 of 1977 for condonation of delay of 8 years and 9 months under section 5 of the Limitation Act. She could have straightaway filed an application contending that there was no service of suit summons on her and the application to set aside the decree has been filed within thirty days from the date of knowledge of the decree. Inasmuch as the petitioner has chosen to file an application for condonation of delay under section 5 of the Limitation Act instead of straightaway pleading that there was no service of the suit summons on her, the present plea put forward by the petitioner that there was no service of suit summons on her, cannot be accepted. The Court below was fully justified in dismissing the application of the petitioner for setting aside the *ex parte* decree passed against her. [*Para.* 4.]

Petition under section 115 of Act V of 1908 praying the High Court to revise the order

*C.R.P. No. 1726 of 1980.

• 20*th October*, 1981.

of the Court of the I Additional Subordinate Judge, Vellore, dated 5th July, 1979 and made in C. M. A. No. 16 of 1979 confirming the orders of the District Munsif, Vellore in I. A. No. nil 19th July, 1977.

C. R. Lakshmanan, for Petitioner.

F. A. Rasheed, for Respondent.

The Court made the following

ORDER.—The third defendant in the suit is the civil revision petitioner before this Court, and the plaintiff is the respondent. An *ex parte* decree was passed against the petitioner on 25th May, 1968. She filed an application I. A. No. 1347 of 1977 on 19th July, 1977 after a delay of 8 years and 9 months, for setting aside the *ex parte* decree. This petitioner's contention was that the suit summons was not served on her and the application setting aside the *ex parte* decree was filed within 30 days from the date of knowledge of the decree. The trial Court held that there was service of suit summons on the petitioner, and as the application to set aside the *ex parte* decree was not filed within thirty days from the date of decree, it refused to set aside the *ex parte* decree against which the present civil revision petition is filed.

2. The petitioner was impleaded as the third defendant in the suit as per the order passed in I. A. No. 342 of 1968 on 15th February, 1968. In I. A. 659 of 1968, dated 20th February, 1968, the schedule of the suit property came to be amended. In the plaint it is stated that the third defendant came to be impleaded as per the orders passed in I. A. 659 of 1968. Relying on the discrepancy in the I. A. number under which the third defendant came to be impleaded as a party, the learned counsel for the petitioner contended that there could have been no service of summons on the third defendant, and the application filed within thirty days from the date of knowledge is well within time.

3. On account of the mistake or discrepancy in noting the I. A. number under which the petitioner came to be impleaded as a party in the suit, it cannot be said that there was no service of suit summons on the petitioner. In I. A. No. 1342 of 1977 it is stated that the petitioner was duly served with summons by affixing the copies of the same at her residence. Due to efflux of time the material records showing the mode of service on the petitioner have been destroyed. Under Order 5, rule 17, Civil Procedure Code, affixture of notice at the residence of defendant can be resorted to:

2. When the defendant refuses to accept service; and

(*b*) When the defendant is absent from her residence and there is no likelihood of her being found at the residence within a reasonable time and there is no agent empowered to accept service of summons on her behalf or any other person on whom service can be made.

4. Service of summons by affixture at the place of residence is one of the recognised modes of service summons on a defendant. If the Court records show that there has been service of summons on the petitioner by affixture at the residence, it must be presumed that all the requirements necessary for service by affixture existed in the instant case and there was compliance of all the statutory requirements for effecting such service on the petitioner, and thereafter it is for the petitioner to rebut the presumption. The petitioner has not placed any material to rebut the presumption. If really there was no service of suit summons on the petitioner, she need not have filed I. A. No. 1342 of 1977 for condonation of delay of 8 years and 9 months under section 5 of the Limitation Act. She could have straightaway filed an application contending that there was no service of suit summons on her and the application to set aside the decree has been filed within thirty days from the date of knowledge of the decree. In as much as the petitioner has chosen to file an application for condonation of delay under section 5 of the Limitation Act instead of straightaway pleading that there was no service of the suit summons her, the present plea put forward by the petitioner that there was no service of suit summons on her, cannot be accepted. The Court below was fully justified in dismissing the application of the petitioner for setting aside the *ex parte* decree passed against her.

5. In the result, the civil revision petition stands dismissed. Parties to bear their own costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

K. Pugal .. *Appellant**

v.

P. Asoka .. *Respondent.*

(A) *Civil Procedure Code* (*V of* 1908) *Order* 5, *rule* 2, *Order* 9, *rule* 13 *and Order* 43— Ex parte *preliminary decree followed by* ex parte *final decree* Ex parte *order appointing a Commissioner—Suit summons not accompanied by copy of the plaint—Service not legal—Effect on subsequent proceedings.*

(B) *Civil Procedure Code* (*V of* 1908), *section* 151—*Inherent powers of the Court—Conversion of civil revision petition to a Civil Miscellaneous Appeal by High Court—Permissibility.*

(C) *Limitation Act* (*XXXVI of* 1963) *Schedule* I, *Article* 123— Ex parte *preliminary decree— Petition to set aside—Starting point of limitation—Date of knowledge of the decree or order.*

Held: The application filed by the petitioner under section 151, Civil Procedure Code, is in effect and in substance one to set aside an *ex parte* preliminary decree and against the dismissal of that petition, only an appeal will lie to this Court and not a revision. So the civil revision petitions filed by the petitioner will have to be converted into a civil miscellaneous appeal by exercising the inherent powers of this Court. [*Para.* 3.]

If there is no due service of summons the period of limitation is 30 days from the date when the applicant had knowledge of the decree.

[*Para.* 4.]

A statutory provision can be construed as a mandatory provision only when a penalty or a disability is provided for non-compliance of it. No penalty or disability is attached for non-compliance of Order 5, rule 2 of the Civil Procedure Code. The provision is only directory and would not make the subsequent proceeding a nullity. It results only in an irregularity which is always curable. [*Para* 3.]

In this case summons has not been duly served in the manner provided under Order 5, rule 15, Civil Procedure Code. Secondly, under Order 5, rule 2, Civil Procedure Code, the summons should be accompanied by a copy of the plaint. In the instant case, the summons sent through post was admittedly not accompanied by a copy of the plaint. The service of summons on the defendant without a copy of the plaint is not legal service as contemplated under the provisions of the Civil Procedure Code. As there has been no proper service of summons on the first defendant-petitioner the period of limitation for setting aside the *ex parte* decree passed against him commenced from the date when he had knowledge of the decree. [*Para.* 4.]

Therefore, the order of the lower Court is set aside and the case is remitted back to the trial Court to consider the question as to when the petitioner came to have knowledge of the *ex parte* preliminary decree passed against him and dispose of the application according to law.

[*Para.* 5.]

Appeals against the orders of the Sub-Court, Tuticorin in I. A. No. 702 of 1976 in O. S. No. 99 of 1974 etc.

The appellant in person.

S. Subbiah, for Respondent.

The Court made the following

ORDER.—This civil revision petitioner in all these petitions is the first defendant in the suit. An *ex parte* preliminary decree was passed against him on 20th December, 1974. He filed a petition I. A. No. 703 of 1976 under section 151, Civil Procedure Code, to vacate the *ex parte* preliminary decree and the order passed is the subject-matter of C. R. P. No. 1702 of 1980. The petitioner filed I. A. No. 704 of 1976 under section 151, Civil Procedure Code, for setting aside the *ex parte* order passed in final decree proceedings

*A.A.O. Nos. 653 to 655 of 1981.
and C.R.P. No. 1702 of 1980. 6*th November*, 1981.

and the order passed against him is the subject-matter of C. R. P. No. 1703 of 1980. The petitioner filed a third application I. A. No. 72 of 1976 for setting aside the *ex parte* order passed against him in the application for appointment of a Commissioner and the order passed against him is the subject-matter of C. R. P. No. 1704 of 1980. All these three civil revision petitions are heard together and disposed of by a common order.

2. The petitioner appearing in person argued his case with commendable skill and ability and contended that as the suit summons were not accompanied by a copy of the plaint there is non-compliance of the mandatory provisions of Order 5, rule 2, Civil Procedure Code, and as the preliminary decree passed is therefore, a nullity and without jurisdiction it is unnecessary for the petitioners to file a petition under Order 9, rule 13, Civil Procedure Code, to set aside such a decree and the application has been filed under section 151, Civil Procedure Code, invoking the inherent powers of this Court to set aside the preliminary decree passed without jurisdiction and an application of this kind is not governed by the provisions of the Limitation Act.

3. A statutory provision can be construed as a mandatory provision only when a penalty or a disability is provided for noncomplaince of the provisions. Since no penalty or disability is provided for non-compliance of Order 5, rule 2, Civil Procedure Code, it is only a directory provision and non-compliance of such a directory provision would not make the subsequent proceeding a nullity. It results only in an irregularity which is always curable. As non-compliance of Order 5, rule 2 will not make a decree a nullity, the petitioner's remedy is only to set aside the decree on the ground that there has been no proper service of summons. The application filed by the petitioner under section 151, Civil Procedure Code, is therefore, in effect and in substance one to set saide the *ex parte* preliminary decree and against the dismissal of that petition only an appeal will lie to this Court and not a revision. So the civil revision petitions filed by the petitioner are converted into civil miscellaneous appeals by exercising the inherent powers of this Court and they are disposed of accordingly.

4. Article 123 of the Limitation Act provides that the period of limitation is 30 days from the date of decree when there is due service of summons on the defendant. If there is no due service of summons, the period of limitation is 30 days from the date when the applicant had knowledge of the decree. So the main question to be considered is whether the petitioner has been duly served with suit summons before the *ex parte* preliminary decree was passed against him. Under Order 5, rule 9, Civil Procedure Code, as it stood at the relevant time, the Court is empowered to have the summons sent by post for service on the defendant and if it is returned unserved, the Court may have the summons served through the officers of the Court. The mode of service of summons which was sent by post or through officers of Court is one and the same and is provided under Order 5, rule 15, Civil Procedure Code. When the defendant is absent the mode of service provided under Order 5, rule 15, Civil Procedure Code, is to serve on an agent empowered to accept service of summons on behalf of the defendant or to serve on any adult member of the family residing with the defendant. In the instant case, the summons sent through post was served on one Kamalasekaran who is admittedly not an agent empowered to accept service of summons on behalf of the defendant. So the summons have not been duly served in the manner provided under Order 5, rule 15, Civil Procedure Code. Secondly under Order 5, rule 2, Civil Procedure Code, the summons should be accompanied by a copy of the plaint. In the instant case, the summons sent through post was admittedly not accompanied by a copy the plaint. The service of summons on the defendant without a copy of the plaint is not legal service as contempltated under the provisions of the Civil Procedure Code. As there has been no proper service of summons on the first defendant-petitioner, the period of limitation for setting asside the *ex parte* decree passed against him commenced from the date when he had knowledge of the decree. The question when the first defendant-petitioner came to have knowledge of the *ex parte* preliminary decree passed against him has not been properly adverted to or considered by the lower Court.

5. The order passed by the lower Court is accordingly set aside and the case is remitted back to the file of the trial Court for considering the question as to when the petitioner came to have knowledge of the *ex parte* preliminary decree passed against him and dispose of the application according to law. The trial Court is directed to dispose of the other two applications, namely, I. A. No. 704 of 1976 and I. A. No. 539 of 1978 by considering each one of them independently and on its own merits. There is no order as to costs.

R.S. —— *C.R.Ps. allowed and remitted to lower Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam* and *S. Nainar Sundaram, JJ.*

New India Insurance Company Limited, Bombay .. *Appellants**

v.

N. Ganapathy and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 31 and 103-A—Motor Vehicle — Transfer by owner to another—Insurance Company not intimated about transfer in the prescribed form—Mere intimation to or knowledge on the part of Insurance Company of the transfer, no use—Policy lapsed on transfer of ownership—Insurance Company not bound to indemnify third parties.

Mere knowledge of the part of the Insurance Company of the change of ownership of the insured motor vechicle would not be tantamount to transfer of the certificate of insurance and the policy described in the certificate in favour of the person to whom the motor vehicle is transferred. When there is a proposal to transfer the ownership of any vehicle in respect of which insurance was taken together with the policy of insurance relating thereto, he has to apply in the prescribed form to the insurer for transfer as contemplated under section 103-A (1) of the Motor Vehicles Act. It could not be stated that the mere intimation of the transfer will satisfy the requirements of the said provision, so that, if there is a failure to respond on the part of the insurance company by intimating the refusal to transfer, the policy shall be deemed to have been transferred in favour of the transferee. Knowledge by itself is of no use. There ought to have been an application for transfer in the prescribed form or at least a request therefor. [*Para.* 7.]

Cases referred to:—

The South India Insurance Company Ltd. v. *Lakshmi*, (1971) 2 M.L.J. 354: 84 L.W. 147: 1971 A.C.J. 122: 41 Comp. Cas. 537: A.I.R. 1971 Mad. 347; *Hema Ramaswami* v. *K. M. Valance Panjam,* (1981) 1 M.L.J. 182: 94 L.W. 142: I.L.R. (1981) Mad. 224: 1981 A.C.J. 288: A.I.R. 1981 Mad. 174; *J. E. Chenn Nayudc* v. *N. Lakshmiammal,* 1980 A.C.J. 189: A.I.R. 1980 A. P. 143; *Calcutta Insurance, Madras, now known as M/s. National Insurance Co., Ltd.* v. *Tirumalai Ammal,* (1981) 94 L.W. 717: 1981 T.L.N.J. 192.

Appeal against the order of the Motor Accident Claims Tribunal, (Sub-Court) Cuddalore, dated 29th July, 1978 in C.P. No. 24 of 1975.

Kurian Arumugham and *Joseph,* for Appellants.

E. Padmanabhan, G. Ethirajulu, Advocate-General, *D. Raju, A. R. Lakshmanan* and *V. Ramajagadeesan,* for Respondents.

The Order of the Court was made by

Nainar Sundaram, J.—On 18th March, 1975, at about 1 P.M. one Kalidas was coming on his cycle near the Town Hall, Nethaji Road, Cuddalore. The bus bearing registration number M. D. B. 1291, which was driven in a rash and negligent manner, dashed against the said Kalidas and caused him multiple injuries resulting in his instantaneous death. The parents of the deceased, respondents 1 and 2 herein filed Claim Petition No. 24 of 1975 before the Motor Accidents Claims Tribunal, Cuddalore, claiming a compensation of Rs. 75,000. The vehicle was originally owned by M. Thiagarajan and it was transferred in favour of G. Govindan on 15th August, 1974, and they are arrayed as respondents 3 and 4 herein. New India In-

* A.A.O. No. 364 of 1979. 30*th July,* 1981.

surance Company, with whom the vehicle was insured, is the appellant herein. The 3rd respondent wanted to be absolved of the liability by pointing out that long before the accident he had parted with the ownership of the vehicle to and in favour of the 4th respondent. The appellant herein, the Insurance Company contended that since the vehicle was transferred by the insured the 3rd respondent, to and in favour of the 4th respondent, the policy of insurance lapsed on such transfer of ownership of the vehicle. The transferee, the 4th respondent admitted the change of ownership but contested the claim on other grounds. There was a general contest that the accident was not due to the rash and negligent driving of the vehicle with regard to the quantum of compensation claimed. The Tribunal rendered a finding that the accident was due to rash and negligent driving of the vehicle and determined the compensation at Rs. 38,000. The Tribunal accepted that there was a change of ownership of the vehicle long prior to the date of accident, but it opined that since the Insurance Company, the appellant, had knowledge of the transfer of ownership, it cannot escape liability under the policy. In this view, the Tribunal passed an award directing the Insurance Company, the appellant only to pay the compensation to respondents 1 and 2 with interest at 6 per cent per annum from the date of petition till date of payment.

2. The appellant, Insurance company, questions the award, putting forth the contention that since the ownership of the vehicle was transferred even on 15th August, 1974, long before the date of accident on 18th May, 1975, the Insurance policy lapsed and no liability could be pinned down on the Insurance company.

3. No submissions were made before us attacking the finding of the Tribunal, that the accident was due to the rash and negligent driving of the vehicle and with regard to the determination of the compensation at Rs. 38,000. Hence, the only question that arises for consideration in this appeal, is, whether the Tribunal was correct in directing the appellant to pay the compensation in spite of the fact that the ownership of the vehicle, which was originally with the 3rd respondent, got transferred in favour of the 4th respondent long prior to the date of the accident on 18th May, 1975.

4. One of us, *viz.*, Ramanujam, J., had occasion to deal with the question, even in 1971, as to whether the policy of insurance could survive when the vehicle was physically transferred by the owner, in *The South India Insurance Company Limited* v. *Lakshmi*[1], and the available case law was analysed and it has been held that the policy of Insurance came to an end when the vehicle was transferred by the owner. Section 31 of the Motor Vehicles Act (hereinafter referred to as the Act) could not have the effect of keeping the policy alive *qua* third parties; change of registry under section 31 was not a condition precedent for the transfer of ownership of the vehicle ; section 31 merely imposed an obligation both on the transferor and the transferee of the vehicle to notify the transfer; and non-compliance with provisions of section 31, did not invalidate the transfer.

5. The Tribunal, in the instant case has laboured itself by writing a lengthy judgment; but still we had to wade through it to spell out the reasonings of the Tribunal with great difficulty. The Tribunal has not lost sight of the *ratio decidendi* of this Court found expressed in the above decision. It referred to the decisions of the High Courts of Orissa, Allahabad and Punjab and Haryana and distinguished the above decision of this Court by stating that it applied only to a case where the Insurance Company was not aware of the transfer and does not apply to the facts of the present case. There is discussion by the Tribunal on the aspect that the Insurance Company had knowledge of the transfer by the third respondent to the fourth respondent and in spite of it, the insurance was continued only in favour of the 3rd respondent. This factor seemed to have weighed with the Tribunal to come to the conclusion that the policy would not lapse and on the basis of the policy, the appellant Insurance Company could be made liable. This, in our view is a misconception of the position. A Bench of this Court, to which one of us, *viz.*, Ramanujam, J., was a party, in *Hema*

1. (1971) 2 M.L.J. 354: 41 Comp. Cas. 537: (1971) A.C.J. 122: 84 L.W. 147: A.I.R. 1971 Mad. 347.

Ramaswami v. *K. M. Valance Panjami*[1], repelled the contention that unless the sale of the vehicle has been recognised and the transfer of registry is effected by the transport authority, there is no completed transfer in law and, therefore, the liability of the insured shall be taken to continue until the registry of the vehicle is transferred in the name of the transferee.

6. Learned counsel appearing for the claimants, respondents 1 and 2 herein, drew our attention to the decision of a Bench of the High Court of Andhra Pradesh in *J. C. Chenna Nayudu* v. *N. Lakshmiamma*[2], in support of the proposition that in spite of the transfer, the registry may be continued in the name of the transferor and in such a case, the registered owner also retains some interest in the vehicle and as such, the Insurance Company could be made liable to meet the claim. There, the facts dealt with were entirely different. The finding rendered by the Bench in that decision was that transferor continued to be the owner of the vehicle for all purposes and the purchaser was only given the right to ply the vehicle. The reasoning of the Bench is found expressed in the following passage at page 192 of the report:—

> "A reading of the entire document, Exhibit B-1, leads to the conclusion that in spite of the stipulation that the balance of consideration would be paid with interest and damages of Rs. 2,000 the entire interest in the vehicle would completely stand transferred to the purchaser only when the transfer of the C certificate and the road permit is effected. In other words, the transferor continued to be the owner for all purposes and the 'purchaser' was only given the right to ply the vehicle. Admittedly, the transferee was plying the vehicle under the Certificate and the road permit standing in the name of the first respondent. The first respondent, must, in the circumstance, of the case, be held to be the 'owner' of the vehicle."

7. Mere knowledge on the part of the Insurance Company of the change of ownership of the motor vehicle would not tantamount to transfer of the certificate of insurance and the policy described in the certificate in favour of the person to whom the motor vehicle is transferred. Section 103-A (1) of the Act reads as follows:

> "103-A (1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter proposes to transfer to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of Insurance relating thereto, he may apply in the prescribed form to the insurer for the transfer of the certificate of insurance and the policy described in the certificate in favour of the person to whom the motor vehicle is proposed to be transferred, and if within fifteen days of the receipt of such application by the insurer, the insurer has not intimated to the insured and such other person his refusal to transfer the certificate and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whomin the motor vehicle is transferred with effect from the date of its transfer."

When there is a proposal to transfer the ownership of any vehicle in respect of which insurance was taken together with the policy of insurance relating thereto, he has to apply in the prescribed form to the insurer for transfer as contemplated under section 103-A (1) of the Act. It could not be stated that the mere intimation of the transfer will satisfy the requirements of the said provision, so that if there is a failure to respond on the part of the Insurance Company by intimating the refusal to transfer the policy shall be deemed to have been transferred in favour of the transferee. Knowledge by itself is of no use. There ought to have been an application for transfer in the prescribed Form or at least a request therefor. In *Calcutta Insurance, Madras, now known as National Insurance Company Limited* v. *Tirumalai Ammal alias Mookamal*[1], a Bench of this Court, to which one of us, *viz.*, Ramanujam, J., was a party, discountenanced the proposition that a mere

1. (1981) 1 M.L.J. 182: 94 L.W. 142: I.L.R. (1981) Mad. 224: (1981) A.C.J. 288: A.I.R. 1981 Mad. 174.
2. (1980) A.C.J. 189: A.I.R. 1980 A.P. 143.

1. (1981) T.L.N.J. 192: 94 L.W. 717.

intimation would suffice for the provisions of section 103-A (1) of the Act, so as to invoke the deeming transfer of the policy as contemplated in the provision. Such being the proposition of law as recognised by judicial precedents of this Court, we are unable to sustain the finding of the Tribuual in the instant case, that merely because the Insurance Company, the appellant herein, had knowlege of the transfer of the ownership in the vehicle, its liability under the policy which never got transferred in favour of the transferee, *viz.*, 4th respondent herein, must be deemed to have continued, so as to bear the liability of compensation.

8. Learned counsel appearing for the claimants, respondents 1 and 2, would submit that in the instant case the endorsement 13 attached to and forming part of the policy will still make the Insurance Company liable in spite of the transfer of the ownership of vehicle. We must straightway point out that in spite of the transfer of the ownership of vehicle on 15th November, 1974, policies of insurance seemed to have been taken in the name of the third respondent only. For the relevant period in question, no policy as such has been produced and marked in the case and only the certificate of insurance for the period from 16th November, 1974 to 15th November, 1975 has been marked as Exhibit B-2. But, the policies for the subsequent periods have been marked as Exhibits B-3, B-4 and B-5. It is not possible for us to assume that endorsement 13 relied on by the learned counsel for respondents 1 and 2 herein was there in the policy covering the relevant period. Furthermore, this contention was not put forth either by the claimants, respondents 1 and 2 herein, or by the 4th respondent herein, before the Tribunal. Even otherwise, we are of the opinion that this endorsement cannot be availed of by respondents 1 and 2 to pin down the liability on the Insurance Company after the lapse of the policy. Endorsement 13, as occurring in the policies for the subsequent periods, reads as follows:-

> "In consideration of an additional premium of rupees and notwithstanding anything to the contrary contained in General Exception No. 4, but subject otherwise to the terms, exceptions conditions and limitations of this policy the company will indemnify the insured against liability at law for compensation (including law costs of any claimant) for death of or bodily injury to any person other than a person excluded under General Exception No. 3 being carried in or upon or entering or mounting or alighting from any vehicle described in the schedule hereto but such indemnity is limited to the sum of Rs. .... in respect of any one person and subject to Rs. ....in respect of any number of claims in connection with any one such vehicle arising out of one cause".

General Exception No. 4 is as follows:

> "The Company shall not be liable under this policy in respect of........ (4) any accident, loss, damage and/or liability caused sustained or incurred after any variation in or termination of the insurer's interest in the motor vehicle".

To invoke this endorsement, the policy must survive in spite of transfer. But, the law on this aspect, as countenanced by decisions of this Court, is that change of ownership in the vehicle puts an end to the policy and the liability on the part of the Insurance Company to indemnify the insured comes to an end. When the interest of the insured got terminated by the transfer of the ownership of the vehicle, it is too much to state that the Insurance Company must indemnify third parties on the basis of the lapsed policy. The insurance of the policies for the subsequent periods in the name of the third respondent is a futile process and could not be taken advantage of by the claimants, respondents 1 and 2 herein. Rightly, the Tribunal exonerated the 3rd respondent from liability, countenancing the change of ownership in favour of the 4th respondent and that has become final. When the insured himself has been exonerated, no question of indemnity could arise either under section 96 or under the terms of the policy. But, curiously, on an erroneous view of the legal position, the Tribunal chose to thrust the burden of compensation on the Insurance Company, the appellant herein. For all these reasons, we are obliged to interfere with the award of the Tribunal. At the same time, it must be held that the fourth respondent, in whom the ownership of the vehicle stood vested at the time of the accident is liable

to pay the compensation to the claimants. In the last but one paragraph of the judgment, the Tribunal did hold that the owner at the relevant point of time, *viz.*, the fourth respondent herein would be liable to pay the compensation amount. Yet it chose to pass an award only against the Insurance Company, the appellant herein.

9. As a result, we set aside the award of the Tribunal directing the appellant herein to pay the compensation amount and pass an award directing the fourth respondent herein to pay respondents 1 and 2 herein, the sum of Rs. 38,000 with interest at six per cent. per annum from the date of the petition, *viz.*, 20th June, 1975 till the date of payment. The parties are directed to bear their respective costs throughout.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Vyapuri Mudaliar .. *Petitioner**

v.

Vallammi and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 15 and Order 22, rule 5—Execution petition — Decree-holder dying during pendency of petition—One of the legal representatives receiving a sum and retiring—Effect—Other legal representatives of the decree-holder continuing the same execution petition, whether permissible.

Under the Civil Procedure Code, there is a specific provision to enable a decree-holder to execute his decree against the legal representatives of a deceased judgment-debtor. But, there is no express provision either in Order 21 or elsewhere in the Code which expressly provides for the filing, or for the continuation, of execution proceedings by the legal representatives of a deceased decree-holder. However, the decree-holder's legal representatives are entitled to file or to continue execution proceedings against the judgment-debtor on the general principle that they, in law, represent the estate of the deceased decree-holder. What we term as the estate of a deceased person cannot be equated to a *persona*. At the same time, an estate of a deceased person cannot be regarded as a mere abstraction. This is because, the definition of 'legal representative' under the Code is such that it is the 'estate' of the deceased which would be the legal representative. It is trite law that all the heirs of a deceased individual need not be brought on record in order that his estate may properly be represented in further proceedings. It is enough that one or some of the legal representatives, who may reasonably be regarded as sufficiently representing the estate are brought on record. In this sense, therefore, the fact that one out of the three legal representatives of the decree-holder in the present case had made peace with the judgment-debtor and had retired from the proceedings does not render the representative capacity of the remaining two legal representatives any the less comprehensive so as to represent and bind the estate. [*Para.* 3.]

There is no reason why, if any one of the legal representatives walks out of the execution proceedings, the remaining legal representatives must either bring the former back into the arena on the respondent's side, or end the proceedings then and there, only to reappear with another petition on their hands. It would serve no purpose whatsoever to drive the execution petitioners to such courses of action. [*Para.* 4.]

Petition under section 115 of Act V of 1908 to revise the order of the Sub-Court, Karaikal, dated 13th December, 1978 in E.P. No. 40 of 1966 in O.P. No. 22 of 1976.

K. Yamunan, for Petitioner.

S. Rajagopalan, for Respondent.

The Court made the following

ORDER.—One Sivashanmugham obtained a mortgage decree against one Vyapuri Mudaliar. In execution of the final decree in the suit, the decree-holder filed an execution petition to bring the hypotheca to sale. Pending the execution petition, the decree-holder died leaving behind him surviving his wife and two

*C.R.P. No. 150 of 1979 (P.).
19th June, 1981.

daughters as his legal representatives. All the three legal representatives brought themselves on record in the execution proceedings and continued the execution petition. The amount due under the mortgage decree was Rs. 7,399.9. During the pendency of the execution petition, one of the daughters of the deceased decree-holder who was brought on record as one of the legal representatives of the deceased decree-holder and who figured as the second petitioner in the execution petition, received a sum of Rs. 1,000 from the judgment-debtor and filed a memo. into Court that she was not pressing that execution petition. The executing Court, after recording the payment and the part satisfaction of the mortgage decree to that extent, posted the execution petition for further proceedings by the remaining two legal representatives of the deceased decree-holder. At this stage, an objection was raised by the judgment-debtor that when one of the legal representatives of decree-holder had declared that the execution petition was not being pressed, that brought about a situation in which the same execution petition cannot be further continued by the remaining two legal representatives. The executing Court, however, did not accept this objection and proceeded to allow the execution petition. The Court held that when the second legal representative declared that she was not pressing the execution petition, she could have no further say in the execution. But, that would not prevent the remaining two legal representatives from proceeding further with the execution petition on hand and from enforcing the decree. The Court further observed that there was nothing wrong in the remaining legal representatives proceeding with the execution petition and pressing the sale of the hypotheca for the realisation of the balance of the decree amount still outstanding. It is this order which is being challenged as being without jurisdiction by the judgment-debtor in this revision petition.

2. I asked Mr. Yamunan, learned counsel for the judgment-debtor, as to what particular procedure the Code of Civil Procedure, has prescribed for a situation which had arisen in this case. Learned counsel was not able to put his finger on any express provision in Order 21 or in any other part of the Code. He, however, hesitantly referred to rule 15 of Order 21, as a near enough provision from which we might stretch a point we want to cover in the present case. Rue 15 refers, in terms to a decree which has been passed jointly in favour of more persons than one. In terms, therefore, this rule cannot apply to the present proceeding, for, this is not a case where there has been a joint decree in favour of co-plaintiffs. On the contrary, there was only one plaintiff in whose favour a decree was passed and, what is more, who had actually, filed an execution petition for enforcing the decree Mr. Yamunan then suggested that when one of the legal representatives of the deceased decree-holder, after receiving some amount from the judgment-debtor bowed herself out and retired from the execution proceedings, then it would have been proper for the executing Court to have done one of two things, namely, either direct the remaining legal representatives to transpose the retiring legal representative as a respondent or file a fresh execution petition exclusively by themselves, leaving out of account the legal representative who had already got paid from the judgment-debtor. Learned counsel submitted that even though the provisions or Order 21, rule 15, Civil Procedure Code, are not directly in point, either one of the courses of action suggested by him would have regularised the further proceedings in this execution.

3. I do not think that the alternative procedures as suggested by Mr. Yamunan are called for in the present case. Under the Civil Procedure Code, there is a specific provision to enable a decree-holder to execute his decree against the legal representatives of a deceased judgment-debtor. But, there is no express provision either in Order 21 or elsewhere in the Code which expressly provides for the filing, or for the continuation, of execution proceedings by the legal representatives of a deceased decree-holder. However, the decree-holder's legal representatives are entitled to file or to continue the execution proceedings against the judgment-debtor on the general principle that they, in law, represent the estate of the deceased decree-holder. What we term as the estate of a deceased person cannot be equated to a person. At the same time, an estate of a deceased person cannot be regarded as a mere abstraction. This is because, the definition of 'legal representative

under the Code is such that it is the 'estate' of the deceased which would be the legal representative. It is trite law that all the heirs of a deceased individual need not be brought on record in order that his estate may properly be represented in further proceedings. It is enough that one or some of the legal representatives, who may reasonably be regarded as sufficiently representing the estate, are brought on record. In this sense, therefore, the fact that one out of the three legal representatives of the decree-holder in the present case had made peach with the judgment-debtor and had retired from the proceedings does not render the representative capacity of the remaining two legal representatives any the less comprehensive so as to represent and bind the estate. Besides, I do not see what improvement it would make to the further proceedings in execution by merely transposing the legal representative in question from the array of the petitioners to the opposite side. Nor can the situation be improved by asking the remaining legal representatives to terminate the present execution proceedings and start a fresh course by filing another execution petition, apparently without making the other legal representative a party either on the one side or on the other side. Both the courses of action suggested by Mr. Yamunan did not improve matters either procedurally or from the point of view of any principle governing remedies by way of execution.

4. It may well be that for a situation of this kind we cannot put our finger on any particular provision which has already been laid down in the Code, in black and white. Even as it is, the execution chapter in the Code is far too elaborate and detailed for its provisions to be supplemented by still more proliferation of technicalities and procedures. It is, however, quite within contemplation that some day the rule-making authority might come to know of a case of the present kind and feel called upon to introduce a fresh rule to cover cases of this kind. And in the process, we might be presented with a set of provisions as formal and as technically ridden as the rest of the rules relating to execution of decrees. But that is no reason why this Court, sitting as a judicial tribunal, must today give its seal of approval to an artificial extension of procedural formalities, when there is no principle under which such an innovative extension of procedure can be supported. As the Court below has rightly said, there is no reason why, if any one of the legal representatives walks out of the execution proceedings, the remaining legal representatives must either bring the legal representative back into the arena on the respondent's side, or end the proceedings then and there, only to re-appear with another execution petition in their hands. It would be quite artificial, and it would serve no purpose whatsoever, to drive the execution petitioners to such courses of action.

5. Having considered the matter carefully, I am satisfied that there is no error of jurisdiction on the part of the executing Court in this case when it proceeded with the execution petition with two out of three legal representatives and made appropriate orders in terms of the relief claimed in the execution petition. This revision accordingly deserves to be dismissed and is hereby dismissed. In the peculiar circumstances of the case, however, there will be no order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Venugopal, J.*

Sakuntala Ammal and another .. *Petitioners**

v.

Seetharama Reddiar and others .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *sections* 4, 5 *and* 28 (2)—*Petition to release properties from custody of official receiver — Allegation that the step mother purchased the properties from the insolvent — Insolvent and official receiver impleaded as parties—Insolvent remaining* ex parte—*Notice by official receiver to all creditors—No response — Counter by official receiver of creditors not taking interest —Application by three creditors to implead themselves as parties to the petition dismissed by the trial Court—On appeal, order confirmed—Revision allowed—Order set aside.*

In the present case, the proceeding initiated by the civil revision petitioners is directed against the transferee of the insolvent and is intended to remove the hurdle created by the insolvent and calculated to bring the property into the common hotchpot for the benefit of all the creditors. Such a suit does not have the effect of dismissing the insolvent state or prejudically affecting the general body of creditors of the insolvency proceedings. As the petition by the civil revision petitioners is not for a remedy for realising the debts and recovering the same by ignoring the insolvency proceedings and will benefit all the creditors by augmenting the insolvency pool, section 28 (2) of the Provincial Insolvency Act is not attracted and leave of Court is not necessary to commence the proceedings. Hence, there is no legal bar for allowing the civil revision petitioners to be impleaded as parties in the claim petition. [*Para.* 3.]

Cases referred to:—

Kishan Dass Talwar v. *Adeshwar Lal Jain*, A.I.R. 1972 Delhi 122; *Harnam Chandar* v. *Rup Chand*, A.I.R. 1932 All. 382; *Donepudi Subramaniam* v. *Nune Narasimhan*, (1929) 56 M. L. J. 489: 29 L. W. 349: A.I.R. 1929 Mad. 323.

Petition under section 75 (1) of the Provincial Insolvency Act to revise the order of the District Court, North Arcot, Vellore, dated 14th November, 1978 in C.M.A. No. 75 of 1976, I.A. No. 687 of 1975 in I.P. No. 15 of 1973, dated 16th February, 1976, Sub-Court, Tiruvannamalai.

R. S. Venkatachari, for Petitioners.

T. R. Rajaraman, for Respondents.

The Court made the following

ORDER.—The petitioner in I.A. No. 617 of 1975 filed the petition under sections 4 and 5 of the Provincial Insolvency Act, to release four items of properties from the custody of the Official Receiver on the ground that his step-mother had purchased those four items from the insolvent. The insolvent and the Official Receiver were impleaded as respondents in that petition. The insolvent remained *ex parte*. The Official Receiver issued notice to all the creditors and having no response from the creditors, filed a counter stating that the creditors have not taken any interest. Thereafter, three of the creditors filed I.A. No. 687 of 1975 to implead themselves as parties in I.A. No. 617 of 1975. In view of section 28 (2) of the Provincial Insolvency Act and the absence of any material to show that the Official Receiver was not acting properly in the interest of the estate, the trial Court dismissed the application filed by the creditors for impleading themselves as parties in I.A. No. 617 of 1975. This order of the trial Court was confirmed in appeal by the lower appellate Court. Hence the present civil revision petition before this Court.

2. The learned counsel for the civil revision petitioner contended that section 28 (2) of the Provincial Insolvency Act has no application to the proceedings sought to be instituted by the three creditors and the Courts below were not justified in passing an order refusing the three creditors to be impleaded in the claim petition filed in I.A. No. 617 of 1975.

3. In *Kishan Dass Talwar and another* v. *Adeshwar Lal Jain and others*[1], it was held that a suit for a declaration that a partition

*C.R.P. No. 2594 of 1979.
14th July, 1981.

1. A.I.R. 1972 Delhi 122.

decree obtained by the insolvent was a fraudulent one to defraud the creditors is not barred by section 28 of the Provincial Insolvency Act, and no leave of the insolvency Court was required for filing it. In *Harnam Chandar* v. *Rup Chand and others*[1], it was held that a declaratory decree that certain property was not attachable or saleable in execution of the decree against the insolvent is not hit by the bar under section 28 (2) as a suit was not a remedy against the property of the insolvent. In the decision reported in *Donepudi Subramaniam* v. *Nune Narasimhan and others*[2], a Division Bench of this Court held that leave of the Insolvency Court under section 12 (2) (*b*) of the Provincial Insolvency Act of 1907 is not necessary for the commencement of a suit by the attaching creditor to contest the order passed in favour of a claimant allowing his claim to the properties attached by the creditor even though the judgment-debtor was adjudicated as insolvent. In the present case, the proceeding initiated by the civil revision petitioners is directed against the transferee of the insolvent and is intended to remove the hurdle created by the insolvent and calculated to bring the property into the common hotchpot for the benefit of all the creditors. Such a suit does not have the effect of dismissing the insolvent estate or prejudicially affecting the general body of creditors of the insolvency proceedings. As the petition by the civil revision petitioners is not for a remedy for realising the debts and recovering the same by ignoring the insolvency proceedings and will benefit all the creditors by augmenting the insolvency pool, section 28 (2) of the Provincial Insolvency Act is not attracted and leave of Court is not necessary to commence the proceedings. Hence, there is no legal bar for allowing the civil revision petitioners to be impleaded as parties in the claim petition, I.A. No. 617 of 1975.

4. In the result, the civil revision petition is allowed and the civil revision petitioners are permitted to be impleaded as parties to the claim petition in I.A. No. 617 of 1975 and the claim petition should be disposed of after hearing the newly impleaded parties. Parties to bear their own costs.

R.S. ——— *Revision allowed.*

1. A.I.R. 1932 All. 382.
2. (1929) 56 M.L.J. 489: 29 L.W. 349: A.I.R. 1929 Mad. 323.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

Ganesan and another .. *Appellants**

v.

K. V. Pandurangan and others .. *Respondents.*

(A) *Motor Vehicles Act (IV of* 1939), *section* 110-*A—Claim petition filed — Delay of one year and six days — Petition to excuse delay—Reason for delay mental shock to the claimant on account of death of only son — Discretion of Court to be exercised judicially and properly.*

(B) *Limitation Act (XXXVI of* 1963), *section* 5—*Concept of explaining each day's delay inapplicable to provisions of the Motor Vehicles Act—Delay excused.*

Held: In the instant case, the only reason offered for excusing the delay in filing the claim petition under section 110-A (3) of the Motor Vehicles Act is that the parents of the deceased were so much overwhelmed with mental distress that they were unable to even think in terms of judicial proceedings before a Tribunal or Court so as to get some benefit on the basis of the death of their only son. In this view, while taking into consideration the contents of the affidavit accompanying this petition and the contents of the counter and the contentions raised therein, the Court has no other alternative than to allow this appeal and excuse the delay of one year and six days, *i.e.*, 371 days. The concept of explaining each day's delay under section 5 of the Limitation Act is entirely different, and alien in the context of the Motor Vehicles Act. Of course, on merits any number of contentions may be raised by the respondent to the claim petition and they have to be gone into by the Court while recording the evidence. But this aspect has to be dealt with by the judicial forum intended for dealing with the claim for compensation, and decide whether the claimant is entitled or not, from the point of view of judicial discretion and in my view, this discretion has to be exercised properly and not

*A.A.O. No. 174 of 1980.

14th September, 1981.

by capricious or arbitrary approach. It must be one which must be judicial in every iota of it. This should be the approach relating to excusing the delay in filing a claim petition under the provisions of section 110-A, clause (3) of the Motor Vehicles Act together with the proviso to that section in dealing with the application for excusing the delay. It is not the length of time that matters. It is the mental feeling with which an aggrieved party which had lost its one and only son that has to be actually entertained in the mind of a judicial forum, which no doubt has to be guided only by legal principles. But legal principles emanate only from moral principles. Section 110-A (3) of the Act has to be interpreted in that light. The delay is excused.

[*Para.* 2.]

Cases referred to:—

Sannahalamma v. *State*, (1973) 2 Mys.L.J. 537: (1974) A.C.J. 24: A.I.R. 1974 Karn. 22; *Sandhya Rani* v. *Sudha Rani*, (1978) 1 S.C.J. 464: (1978) 2 S.C.C. 116: (1978) 2 S.C.R. 839: A.I.R. 1978 S.C. 537.

Appeal against the order of the District Court, Salem, dated 13th August, 1978 in I.A. No. 1538 of 1977 in unnumbered M.A.A.C.

V. Sridevan, G. Masilamani and *C. Jayaraj*, for Appellants.

A. Veeraswami, Madanagopal Rao for *Kurian, Arumugham* and *Joseph*, for Respondents.

The Court made the following

ORDER.—The important point that arises for consideration in this case is, whether there are sufficient and adequate reasons to excuse the delay of one year and six days in filing the claim petition under section 110-A of the Motor Vehicles Act (IV of 1937) before the Tribunal. The main argument that is advanced on behalf of the appellants herein is that due to the mental shock that had actually influenced the mind of the parents of the deceased who was their eldest son, they were unable to prepare for instituting a claim in the Tribunal concerned, and as such, the strict rules of limitation contemplated by section 5 of the Limitation Act, should not be applied to this case, especially when that plea has been put forward as a ground for excusing the delay of one year and six days. In support of this contention raised on behalf of the appellants, the decision in *Sannahalamma* v. *State*[1], is relied on by the learned counsel, Mr. K. Surendranath. In a most persuasive way he submits that section 110-A, clause (3) of the Motor Vehicles Act and the concept underlying the same tends towards approaching the question relating to excusing the delay in a more liberal and humane way than in the way contemplated under section 5 of the Limitation Act, which is more rigorous in its nature. I have gone through the *ratio decidendi* in *Sannahalamma's case*[1] and *Sandhya Rani* v. *Sudha Rani*[2]. The decision of the Supreme Court is purely under section 5 of the Limitation Act (XXXVI of 1963) and this decision does not touch the concept underlying section 110-A, clause (3), which reads as followes:—

"No application for compensation under this section shall be entertained unless it is made within six months of the occurrence of the accident:

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

2. A reading of section 110-A, clause (3) of the said Act shows that no petition by the aggrieved person for compensation relating to an accident and its impact on the person of himself or the dependant or the person for whom he is entitled to compensation under this section 110-A, shall be entertained unless it is made within six months of the occurrence of the accident, provided the Tribunal was satisfied that the claimant was prevented by sufficient cause from making the application in time. Thus, a reading of the section as mentioned above shows that there must be certain materials available so as to satisfy the judicial conscience of the Tribunal or the Court dealing with the application for excusing the delay so as to hold that there were certain circumstances actually present and which prevented the petitioner or the claimant from making the

1. (1973) 2 Mys.L.J. 537: 1974 A.C.J. 24: A.I.R. 1974 Karn. 22.

2. (1978) 1 S.C.J. 454: (1978) 2 S.C.C. 116: (1978) 2 S.C.R. 839: A. I. R. 1978 S.C. 537.

application and that the cause shown by the applicant or claimant is sufficient and adequate. Each case has to be approached with facts that are available in it by way of evidence or by way of matters which are forming part of the affidavit accompanying the petitions relating to excusing delay which will show the reasons so as to excuse the delay occurred in the case or not. In the instant case, the only reason that is offered for excusing the delay is that the parents of the deceased were so much overwhelmed with grave mental distress that they were unable to even think any way in terms of judicial proceedings in a Tribunal or Court so as to get some benefit on the basis of the death of their only son. In this view, while taking into consideration the contents of the affidavit sworn to and accompanying this petition and the contents of the counter and the contentions raised therein, this Court has got no other alternative than to allow this appeal and excuse the delay of one year and six days, *i.e.*, 371 days though it is very much stressed on the other side that each day ought to have been explained as per the concept of section 5 of the Limitation Act. It has to be made clear that this concept is entirely different when read together with the Motor Vehicles Act. Of course, on merits any number of contentions may be raised by the respondent to the claim petition and they have to be gone into by the Court while recording the evidence. But this aspect has to be dealt with by the judicial forum intended for dealing with the claim for compensation, and decided whether the claimant is entitled or not, from the point of view of judicial discretion and in my view, this discretion has to be exercised properly. It should never come in the way of capricious or arbitrary approach. It must be one which must be judicial in every iota of it. That is how this Court lays down the law relating to appreciation of the submissions relating to excusing the delay that arose under the provisions of section 110-A, clause (3) together with the proviso to that section while dealing with the application for excusing the delay. It is not the length of time that matters. But, it is the concept of mental feeling with which an aggrieved party which had lost its one and only son that has to be actually entertained in the mind of a judicial forum, which, no doubt has to be guided only by the legal principles. But legal principles are emanating only from moral principles. When that is the concept, this provision under section 110-A, clause (3) of the Motor Vehicles Act, has to be interpreted only in the above way and in that view, this appeal is allowed. The delay is excused. The Tribunal is directed to take the petition on file and dispose of it on merits after giving opportunities to both sides to let in evidence, both oral and documentary and come to a correct conclusion on the basis of the evidence placed before it. Under these circumstances, there is no order as to costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Smt. M. K. Srimathi Ammal .. *Petitioner**

v.

P. Chellammal and another .. *Respondents.*

(A) *Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (XV of* 1976), *section 3—Institution of suit — Moratorium in force—Suit whether barred—Petition by defendant to dismiss suit—Suit dismissed—Dismissal order set aside.*

(B) *Civil Procedure Code (V of* 1908), *section 9 and Order 7, rule* 11*—Rejection of plaint—Applicability to suit under section* 3 *of Act (XV of* 1976).

(C) Stare decisis—*When applies.*

Held: Section 3 of the Tamil Nadu Indebted Agriculturists (Temporary Relief) Act, no doubt, bars the initiation of a suit during the period of moratorium. But, the Act does not say how a suit which has been brought on the file of the Court in contravention of this interdict by the Legislature should be dealt with by the Court. [*Para.* 3.]

The principle of *stare decisis* will apply only if the previous decision was precisely on the same provision of law. [*Para.* 5.]

*C.R.P. No. 2138 of 1978.
9th February, 1981.

All that section 3 indicates is that for the duration of the period of moratorium, no suit for a debt shall be instituted. In other words, it is only a temporary bar for the institution of the suit and not a bar which takes away the suit from the cognizance of the civil Courts altogether. It is quite plain that the moment the period of moratorium comes to a close the suit cannot be described as one whose cognizance is barred within section 9 of the Code. Hence it would be incorrect to give a disposal by way of a final quietus to a suit in a fashion which will go against the provisions of section 9 of the Civil Procedure Code. [*Para.* 6.]

The cause of action pleaded in the suit is an unpaid debt; hence Order 7, rule 11 (*a*) has no application. [*Para.* 8.]

Order 7, rule 11 (*d*), Civil Procedure Code, providing for rejection of a plaint will not apply to the present situation, because the bar which affects the present suit under section 3 of Act (XV of 1976) is not the kind of bar which is spoken of under section 9 of the Code, and which is referred to under Order 7, rule 11 (*d*) of the Code. [*Para.* 9.]

Cases referred to:—

Srihari Babu Naidu v. *S. Alamelu Ammal*, (1980) 2 M. L. J. 115: 93 L. W. 217; *Ramananthan Chettiar* v. *Ramaswami, Pillai* (1957) 2 M.L.J. 267: 70 L.W. 733: I.L. R. (1957) Mad. 1256: A.I.R. 1957 Mad. 780.

Petition under section 115 of Act V of 1908 to revise the order of the Sub-Court, Madurai, dated 19th July, 1977 in I.A. No. 89|87 in O.S. No. 406 of 1976.

B. R. Ramesh Babu, for Petitioner.

P. Pandi and *N. Sivamani*, for Respondents.

The Court made the following

ORDER.—The Tami Nadu Indebted Agriculturists (Temporary) Relief Act (XV of 1976) by section 3 laid down that no suit for the recovery of a debt shall be instituted against any agriculturist in any civil Court on and from the date of commencement of the Act and before the expiry of one year from the said date. Under section 1 (3), the Act was deemed to have come into force from 15th day of January, 1976. The one year period referred to in section 3 would thus expire on 15th January, 1977. The moratorium period of one year was extended from time to time by the subsequent enactments passed by the State Legislature. In overall result, the period of moratorium against filing of suits for recovery of debts subsisted from 15th January, 1976 to 15th July, 1978.

2. The petitioner in this revision brought a suit against the respondent during the subsistence of the moratorium on 20th September, 1976. The suit was instituted on the file of the Sub-Court, Madurai. This suit although its institution was barred by the statute nevertheless appears to have been numbered as Original Suit No. 106 of 1976. In Interlocutory Application No. 89 of 1977, the defendant thereupon moved the Court to dismiss the suit on the score that the suit had been instituted in contravention of the bar under section 3 of the Act. The Court allowed the said application, and dismissed the suit, as a consequence. The said order allowing the application was made on 19th July, 1977. This revision has been brought by the plaintiff as agaist the order allowing Interlocutory Application No. 89 of 1977.

3. It may be noticed that on the date when the Court below allowed the first defendant's application, namely, 13th July, 1977, the period of moratorium was subsisting. But the question is, whether the dismissal of the suit can be supported on the construction of section 3 of the Act. In any case, now that the period of stay (*sic*) under Act (XV of 1976) as extended by Act (II of 1977), had spent itself out, the question is whether this Court should not take note of subsequent developments and look at the matter from a realistic point of view, on the basis of the existing situation, here and now. Section 3 of the Act, no doubt, bars the initiation of the suit during the period of moratorium. But, the Act does not say how a suit which has been brought on the file of the Court in contravention of this interdict by the Legislature should be dealt with by the Court. Several modes of dealing with such a suit suggest themselves to one's mind. The receiving section of the Court, by a ministerial disposal can reject or return the plaint as one filed in contravention of the statute. The Court it-

self can hold in abeyance the number of the suit. Or the Court may put off dealing with the suit effectively staying its hand in the suit, for the duration of the moratorium. The Court below had done none of those things, but had chosen to dismiss the suit altogether. The question is whether this is an appropriate thing to do, even when section 3 had been clearly contravened.

4. I do not think it necessary to deal at length with the question of construction of the section or with the question as to the consequences of non-compliance with the section. For, this matter has been dealt with *in extenso* in a judgment of Ratnam, J., reported in *Srihari Babu Naidu* v. *S. Alamelu Ammal*[1].

5. Mr. Sivamani, learned counsel for the respondent, submitted that the decision of Ratnam, J., has to be considered as not quite consistent with an earlier decision of a learned single Judge of this Court by Rajagopalan, J., reported in *RM. M. Ramanathan Chettiar* v. *Ramaswami Pillai and another*[2]. A reference to the judgment of Ratnam, J., shows that technically the decision of Rajagopalan, J., was not binding on him, since the earlier ruling was rendered under a different Act. I agree with Ratnam, J., that the principle of *stare decisis* would only apply if the previous decision was precisely on the same provision. On the particular enactment which is now before me, namely, Act XV of 1976, Ratnam, J.'s decision is the only decision holding the field, and not the decision of Rajagopalan, J. Hence on the principle of *stare decisis,* I am bound to follow only the ruling of Ratnam, J.

6. Apart from the reasonings to be found in the judgment of Ratnam, J., I would also like to refer to the provisions of section 9 of the Civil Procedure Code, to reinforce his conclusion. Section 9 says that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Section 3 of Act XV of 1976 and the corresponding provisions of the subsequent Temporary Debt Relief enactments do not bar the cognizance of the suits for enforcement of debts. They do not bar the cognizance, either expressly or impliedly. All that section 3 indicates is that for the duration of the period of moratorim, no suit for a debt shall be instituted. In other words, it is only a temporary bar for the institution of the suit and not a bar which takes away the suit from the cognizance of the civil Courts altogether. The real import of the statutory bar under this Act is also seen from the fact that section 5 itself refers to 'the time during which the institution of the suit was barred by section 3'. It is quite plain therefore that the moment the period of the moratorium comes to a close the suit cannot be described as one whose cognizance is barred within section 9 of the Code. Hence it would be incorrect to give a disposal by way of a final quietus to a suit in a fashion which will go against the provisions of section 9 of the Civil Procedure Code.

7. Mr. Sivamani referred me to section 26 of the Code to emphasise the obvious, namely, that a suit is instituted by the presentation of a plaint. From this provision in the Code he argued that when section 3 of Act (XV of 1976) bars the institution of a suit, then the effect of that bar is to prevent a plaint being presented before the Court. While I agree with learned counsel that even at the threshold the plaint must be stopped from entry into the registry of the Court, but, the whole point is that neither section 3 of Act (XV of 1976) nor section 26 of the Code says how the Court can deal with a situation where, for some reason, the plaint has not only been received by the Court's registry, but it has also been numbered as a suit. Nor do these provisions say what is to be done with the suit, wrongly taken on file and given a number after the expiry of the period of the moratorium.

8. Learned counsel also referred to Order 7, rule 11 of the Code to make a submission that the dismissal of the suit by the Court below was in accordance with the law. He particularly relied on rule 11 (*a*) of Order 7, which says that the Court shall reject a plaint wherein cause of action is not disclosed. I do not think this rule has any relevance to the present discussion. In my judgment, in a case of this kind, the suit cannot be rejected

1. (1980) 2 M.L.J. 115: 93 L.W. 217.
2. (1957) 2 M.L.J. 267: 70 L. W. 733: I.L.R. (1957) Mad. 1256: A. I. R. 1957 Mad. 780.

for non-disclosure of the cause of action. For, it is precisely on the basis of the cause of action being what it is, that section 5 of Act (XV of 1976), is sought to be invoked. The cause of action pleaded in the suit is an unpaid debt and hence Order 7, rule 11 (*a*) has no application.

9. Learned counsel than relied on Order 7, rule 11 (*d*). Under this sub-rule, the Court is under a duty to reject a plaint where the suit appears, from the statement in the plaint to be barred by any law. This clause will not apply to the present situation because, as I have already observed the bar which affects the present suit under section 3 of Act (XV of 1975) is not the kind of bar which is spoken of under section 9 of the Code, and which is referred to under Order 7, rule 11 (*d*) of the Code. As I earlier mentioned more than once section 3 of Act (XV of 1976) does not bar the suit, but only prevents the suit from being filed for a particular duration of time.

10. For all the above reasons, I hold that the Court below was not right in granting the application filed by the defendant to dismiss the suit for the reason that it was instituted while the moratorium under section 3 of the Act (XV of 1976) was subsisting. I, therefore set aside the order. In its place, there shall be an order dismissing that application. The consequence of my order is that it would render the lower Court's dismissal of the suit a nullity. The result is that the Court below will take back the suit on file and hear and determine the suit in accordance with law.

11. The civil revision petition is disposed of accordingly. There will be no order as to costs in the special circumstances of the case.

R.S. ——— *Petition allowed and matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

S. A. Appal Raja .. *Petitioner**

v.

The Common Fund of Senguntha Mudaliar Community of Poopalrajapatti, Rajapalayam, through its President, S. A. Thangavel .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *sections* 29 *and* 10 (3) (b)—*Building owned by a society called "The Common Fund of Senguntha Mudaliar Community of Poopalrajapatti"—Petition to evict tenant under section* 10 (3) (b), *if maintainable—Petitioner Society whether public charitable trust—Tests applicable.*

For a charity to be public, it is not necessary that its objects should encompass the universe or all mankind. It is enough that it refers to a section of the public as a determinate class of the society. [*Para.* 8.]

The distinction between public and private trusts is not drawn merely from the particular description employed by the draftsman. It must be examined on a consideration of the subject and context of the document or other legal writing in which the expression is employed. The absence of the epithat, "public" cannot necessarily be construed as ruling out the reference to public trusts, if the subject and context indicate otherwise. The description of trusts and institutions in the Government's Notification dated 14th August, 1974, did not suffer in the least from the omission of the appellation 'public'. The religious trusts referred to in the said Notification denoted only public religious trusts, since they were preceded by the words, 'Hindu, Christian, and Muslim'. If the intention were to refer to private trusts, the reference to the three great religious denominations would have been quite unnecessary. Likewise, the expression 'charitable institution' can refer only to public charitable institutions. Charity *per se*, has a well-defined meaning in many advanced legal systems, including our

* C.R.P. No. 796 of 1979.
28th August, 1981.

own. Charity is not alms-giving or private charity. It refers to advancement of any object of public utility or benefit, such as education, public-health, poor relief and the like. The mere employment of a word like 'charity' in collocation with the expression 'institution' denotes institutionalised charity, or in, in other words, public charity. The Notification dated 12th August, 1974, when it referred to Hindu, Christian and Muslim religious trusts and charitable institutions had in mind only public trusts and public charitable institutions. In this sense, therefore the subsequent Notification dated 16th August, 1976 did not make for a departure in the Government's exemption policy but only made explicit what was implicit in the earlier Notification. Since the Notifications of exemption have precisely the same subject and content, the declaration in the later Notification that it supersedes the former Notification cannot be held to have brought about any break in the continuity of the exemption from 14th August, 1974, onwards. All that the supersession, in the context involved is that as from 16th August, 1976, the exemption is to be traced to the Notification bearing that date. The source of the same exemption prior to that date was to be found in the earlier Notification. [*Paras*. 15 *and* 16.]

The coverage of the exemption and the coverage of section 10 (3) (*b*) are substantially the same. It would almost seem that the exemption of religious trusts and charitable institutions was specially aimed by the State Government to rob these institutions of the benefit of the special provisions of section 10 (3) (*b*). There, indeed, may be trusts and institutions which while being covered by section 10 (3) (*b*) may yet remain unaffected by the Notification exemption, such for instance, as Parsi religious trusts. But this distinction does not matter in the present case, because the Sengunthars for whose benefit the Society had come into being are covered by the exemption of Hindu religious trusts and charitable institutions. The tenant in this case was justified in raising an objection to the maintainability of the eviction petition on the ground that the building in which he is a tenant is wholly exempt from all the provisions of the Act. It follows that the order of eviction passed by the appellate authority in appeal, acting on the tacit assumption that the petition was maintainable is bad in law. [*Paras*. 19 *and* 21.]

Cases referred to:—

Ahmedabad Caste Association v. *Commissioner of Income-tax,* (1972) 1 I.T.J. 306: (1972) 1 S.C.J. 458: 1972 Tax.L.R. 78: 82 I.T.R. 704: (1972) 1 S. C. R. 744: A.I.R. 1972 S.C. 273; *Sengalaneer Pillayar Temple* v. *Manickam Chettiar,* (1977) 90 L. W. 162.

Petition under section 25 of Tamil Nadu Act XVIII of 1960 (as amended by Act XXIII of 1973), praying the High Court to revise the order of the Court of the Subordinate Judge, Ramnad at Madurai, dated 16th January, 1979 and made C.M.A. No. 62 of 1978 C.H.R.C. No. 9 of 1976 on the file of the Rent Controller (District Munsif) Srivilliputhur.

T. R. Ramachandran, for Petitioner.

M. R. Narayanaswami, for Respondent.

The Court delivered the following

JUDGMENT.—The question in this revision is whether an eviction petition before the Rent Controller was maintainable? The building which figures in the eviction petition is owned by a Society called "The Common Fund of Senguntha Mudaliar Community of Poopalrajapatti", Rajapalayam. The building is a non-residential building in Rajapalayam town. The building was under the occupation of a tenant. He is the respondent in this revision. The Society required the building for its own purposes. It accordingly moved the Rent Controller, by petition, to evict the tenant from the building.

2. The Rent Controller dismissed the petition on a pure technicality. He said that the Society should have filed its petition under section 10 (3) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. But the Society had actually filed the eviction petition only under section 10 (3) (*a*) (*iii*) of that Act. The Rent Controller dismissed the eviction petition for quoting a wrong provision of the statute in the cause title. On appeal, the appellate authority eschewed this firmsy technically, and ordered the eviction of the tenant on the ground that

the Society had established its ground for eviction, namely, that it required the building for its own purposes.

3. This revision is brought by the tenant. His learned counsel, Mr. T. R. Ramachandran, raised a new point for my consideration. His urged that the Society's eviction petition was not maintainable, since the Society was a charitable trust or institution, and since buildings owned by such trusts and institutions were exempted by the Government from the provisions of the Act in exercise of their powers of exemption under section 29 of the Act.

4. Mr. M. R. Narayanaswami, learned counsel for the Society, objected to this contention being raised for the first time in revision. He said that to decide this issue, further facts will have to be investigated, which cannot be undertaken at this stage. I, however, overrule Mr. Naryanaswamy's objection, since the point raised by the tenant in this revision is a pure question of law and also a question of jurisdiction, to boot. And, as I shall presently show, the determination of this point does not involve any further probe into facts, but could be undertaken satisfactorily by a reference to the documents already marked in the case.

5. The Society was registered a long time age under the Societies Registration Act, 1860. The Memorandum and Articles, as registered with the Registrar, a copy of which has been exhibited in the case, shows that the Society had come into being with the avowed object of advancing the social, economic, educational, religious and public health requirements of the Sengunthar Community in Boopalrajapatti, Rajapalayam. The objects, *inter alia,* also specifically refer to the maintenance of libraries and reading rooms.

6. Mr. Ramachandran's argument was that with these aims and objects the Society must be held to be a charitable trust or institution within the meaning of the notification issued by the State Government under which the buildings owned by such trusts and institutions are declared exempt from the Act.

7. Mr. Narayanaswami contended that the relevant notification exempting public charitable trusts and institutions does not apply to this Society. This argument appeared to be somewhat inconsistent with the reliance placed by the Society itself on section 10 (3) (*b*) of the Act as the relevant provision of law under which it had sought to maintain its eviction petition. For section 10 (3) (*b*) too applies only to "a religious, charitable, educational or other public institution". Mr. Narayanaswami's point, however, was that whereas section 10 (3) (*b*) referred to *public* institutions of a religious, charitable, educational kind, the Society in the present case cannot be treated as a 'public' institution in that sense. According to learned counsel, since, the Society's objects were confined to the advancement of a particular community, to wit, the Sengunthars, and since there was a further limitation that the members of this community must be residents of the village of Poopalrajapatti, the Society cannot be called a public charitable society of institution.

8. The argument of Mr. Narayanaswami is based on a wrong notion of what a public charitable society is. For a charity to be public it is not necessary that its objects should encompass the universe or all mankind. It is enough that it refers to a section of the public as a determinate class of the society. In *Ahmedabad Caste Association* v. *Commissioner of Income-tax Gujarat*[1], the Supreme Court observed that it is enough if the section of the community sought to be benefited by the institution is sufficiently definite and identifiable by common quality of a public, or impersonal, nature. The Society in this case has no intention to select any individuals as objects of its beneficial activities. It is not an exclusive club. On the other hand, it came into being in order to advance the objects of a section of the community, without discrimination.

9. Mr. Narayanaswami, in the course of his argument, referred to an exclusory provision in the objects clause in the Society's Memorandum which excluded from the class of beneficiaries members of the Sengunthar Community who had been ostracised or ex-communicated. This clause does not, in my view, derogate from the public character of the Society, because those who are ostracized or ex-communicated cease to be Sengunthars, and in that

1. (1971) 82 I.T.R. 704: (1972) 1 S.C.R. 744: (1972) 1 I.T.J. 306: (1972) I S.C.J. 458: 1972 Tax.L.R. 78: A.I.R. 1972 S.C. 273.

event there is no need even, for their express exclusion from the objects clause.

10. Mr. Narayanaswamy, then said that the exemption from the Act, which is being pleaded now by the tenant, happened to be notified by the State Government only subsequent to the filing of the eviction petition, that it has no retrospective operation and hence it cannot be invoked in the present case. Learned counsel relied on a ruling of a division bench of this Court in support *Sengalaneer Pillayar Temple* v. *Manickam Chettiar*[1]. In that case, the division bench laid down the principle that the power of the State Government to grant exemption from the Act is purely an executive or administrative power, and hence any exemption notified by the Government in exercise of that power cannot have retrospective operation.

11. The question in this case does not raise any point of principle, but one of application of the principle decided by the division bench. For the purpose of the present discussion, two notifications for exemption issued by the State Government have got to be considered, one dated 12th August, 1974, and the other dated 16th August, 1976. Under the earlier notification, the Government exempted from the Act buildings owned by "Hindu, Christian and Muslim religious trusts and charitable institutions". The later notification exempted from the Act buildings owned by "Hindu, Christian and Muslim religious public trusts and public charitable institutions". It may be observed that in this case the Society had filed its eviction petition against the tenant on 30th March, 1976, which was subsequent to the notification dated 12th August, 1974, but prior to the notification dated 16th August, 1976.

12. Mr. Narayanaswami's contention for the Society was that since the Government passed the notification dated 16th August, 1976 statedly "in supersession" of the earlier notification dated 12th August, 1974, no legal effect could be attributed to that earlier notification. Mr. Ramachandran for the tenant, pointed, on the other hand, to the fact that the earlier notification was in force on 30th March, 1976, when the Society filed the eviction petition. That being so, learned counsel urged, its subsequent supersession cannot render the eviction petition competent, when on the date of its filing, the notification was in force rendering it incompetent. Learned counsel said that what is relevant on the issue of maintainability of a legal proceeding in the state of the law or of the legal position which obtains as at the date of the institution of the legal proceedings, and not as at any other point of time.

13. On the contentions aforesaid it becomes necessary to consider the scope of the notification dated 12th August, 1974, and further consider not only the scope of the subsequent notification dated 16th August, 1976, but also its impact on the previous notification. This approach is particularly called for since on a comparison and contrast of the wording of the two notifications, an argument was advanced to the effect that the subsequent notification alone applied to public religious trusts and public charitable institutions. The argument was based on the presence of the expression 'public' occurring in the subsequent notification dated 16th August, 1976 and on its absence from the earlier notification dated 12th August, 1974.

14. We do not know the reasons which impelled the State Government to re-notify the exemption in August, 1976, with a verbal distinction. It is not the practice of the executive to issue Statements of Objects and Reasons for notifications, or, for that matter, to explain the background for statutory rules made by the executive in exercise of statutory powers. The task in every case is thus one of construction of the language employed by the executive.

15. There is, no doubt, a distinction in law between private trusts and public trusts. But the distinction is not drawn merely from the particular appellation or description employed by the draftsman. Whether the reference to a trust is to be construed as a reference to a public trust or not must be examined on a consideration of the subject and context of the document or other legal writing in which the expression is employed. The absence of the epithet 'public', cannot necessarily be construed as ruling out the reference to public trusts, if the subject and context indicate otherwise. In my judgment, the description

1. (1977) 90 L.W. 162.

of trusts and institutions in the Government's earlier notification dated 14th August, 1974, does not suffer in the least from the omission of the appellation 'public'. To my mind, the religious trusts referred to in the said notification denote only public religious trusts, since they are preceded by the words 'Hindu, Christian and Muslim'. If the intention were to refer to private trusts, the reference to the three great religious denominations would have been quite unnecessary. Likewise, the expression 'charitable institution' can refer only to public charitable institutions. Charity, *per se,* has a well-defined meaning in many advanced legal systems, including our own. Charity is not alms-giving or private charity. It refers to advancement of any object of public utility or benefit, such as education, public health, poor relief and the like. The mere employment of a word like 'charity' in collocation with the expression 'institution' denotes institutionalised charity, or in, in other words, public charity. I am satisfied that the prior notification dated 12th August, 1974, when it referred to Hindu, Christian and Muslim religious trust and charitable institutions had in mind only public religious trusts and public charitable institutions. In this sense, therefore, the subsequent notification of 16th August, 1976, did not make for a departure in the Government's exemption policy, but only made explicit what was implicit in the earlier notification.

16. Since the two notifications of exemption have precisely the same subject and content, the declaration in the later notification that it supersedes the former notification cannot be held to have brought about any break in the continuity of the exemption from 14th August, 1974 onwards. All that supersession, in the context, involved is that as from 16th August, 1976, the exemption is to be traced to the notification bearing that date. The source of the same exemption prior to that date was to be found in the earlier notification. But the exemption continued. The ruling in the bench decision in *Sengalaneer Pillayar Temple* v. *Manickam Chettiar*[1], only laid down the principle that an exemption issued by the executive Government cannot be read as possessing retrospective effect. The decision did not have to go into the inter-relationship between the two notifications of 12th August, 1974 and 16th August, 1976. Besides, when the decision laid down that exemptions cannot be notified retrospectively, the said decision must also, by the same token, be held as authority for the further position that a notification once granted cannot be cancelled retrospectively, but can be taken away only prospectively. Thus, when the earlier notification was superseded by the later notification dated 16th August, 1976, the supersession did not have the effect of nullifying the prior notification *ab initio.* To hold otherwise would be to invest the notification dated 16th August, 1976, with retrospective power, which the bench decision has ruled out altogether.

17. Mr. Ramachandran, at one stage of his argument, even seemed prepared to accept the Society as less than a public trust or institution and as equivalent to a private society or as an exclusive club, if only to fit it in with a construction of the earlier notification dated 12th August, 1974, as a notification strictly confined to private religious trusts and private charitable institutions. However, the correct position, as I have shown above, is quite otherwise. Not only is that society, under its Memorandum, an institution of a public character, but the notification of 12th August, 1974 also relates only to public religious and charitable trusts and institutions.

18. The result of this discussion is that the eviction petition filed by the Society is not competent, since the building to which it relates was clearly exempt from the provisions of the Act.

19. Mr. Narayanaswami urged finally that the eviction petition filed by the Society falls to be dealt with under section 10 (3) (*b*) of the Act, and this position cannot be overlooked. According to learned counsel, section 10 (3) (*b*) is not a general provision applicable to all landlords, but a special provision meant to subserve the interests of public institutions alone, Mr. Narayanaswamy's argument was that the exemption notified by the Government on 12th August, 1974, was not intended to affect eviction petitions filed by public institutions under this special provision. This argument, however, cannot be

1. (1977) 90 L.W. 162.

accepted, for two reasons. The first is that the exemption under the notification dated 12th August, 1974, covers, in terms, "*all* the provisions of this Act". This phrase, surely, must include within its all pervading sweep section 10 (3) (*a*) as well. Secondly, on my construction of the terms of the notification dated 12th August, 1974, the trusts and institutions covered by the exemption are public religious and charitable trusts. The coverage of the exemption and the coverage of section 10 (3) (*b*) are thus substantially the same. It would almost seem that the exemption of religious trusts and charitable institutions was specially aimed at by the State Government to rob these institutions of the benefit of the special provisions of section 10 (3) (*b*). There, indeed, may be trusts and institutions which, while being covered by section 10 (3) (*b*) may yet remain unaffected by the notification for exemption, such, for instance, as Parsi religious trusts. But this distinction does not matter in the present case, because the Sengunthars for whose benefit the Society had come into being are covered by the exemption of Hindu religious trusts and charitable institutions.

20. I may observe, in conclusion, that the constitutional validity of section 29 of the Act is even now under challenge in certain proceedings pending before the Supreme Court. As on date, however, there is no authoritative decision, which nullifies the State Government's powers of exemption under section 29 of the Act or which invalidates the notification dated 12th August, 1974 and 16th August, 1976. Besides, while disposing of a revision under the Act, this Court cannot question the validity of any of the provisions of the Act, although the Court's jurisdiction to go into contitutional issues of this kind is undeniable in proceedings properly brought under Article 226 of the Constitution of India.

21. For the reasons I have earlier set out, however, I am satisfied that the tenant in this case was justified in raising an objection to the maintainability of the eviction petition on the ground that the building in which he is a tenant is wholly exempt from all the provisions of the Act. It follows that the order of eviction passed by the appellate authority in appeal, acting on the tacit assumption that the petition was maintainable, is bad in law. I, therefore, set aside the order passed by the appellate authority, and hold that the dismissal of the eviction petition by the Rent Controller was justified, although for the quite different reason that the petition is not maintainable. The revision accordingly succeeds. The tenant shall have his costs from the respondent-society.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Chellammal .. *Petitioner**

v.

R. T. Seethalakshmiammal and another .. *Respondents.*

Tamil Nadu Debt Relief Act (XL of 1979), *section* 21—*Applicability — Property sold on 27th November,* 1978—*Application to set aside sale filed on* 18*th September,* 1979—*Delay of seven days*—Bona fide *mistake of advocate as to the last date—Petition to excuse delay, whether maintainable — Provisions of the Limitation Act, if could be applied.*

Held: The Legislature did not completely rule out of consideration the entire Limitation Act. The words have to be understood only in the context of avoiding a conflict between the Limitation Act and section 21 of the Tamil Nadu Debt Relief Act XL of 1979. Further, there is also the expression "notwithstanding anything contained in the Code of Civil Procedure, 1908," occurring in this very section. It does not mean that the whole of the Code of Civil Procedure is to be excluded in which event, the Executing Court which functions under the Code will have no part to play. It cannot be said that the entire Limitation Act including section 5 is barred from consideration in the present case. [*Para.* 5.]

It is possible that there was some misapprehension on the part of the Advocate that it was enough for him to explain the delay

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*C.R.P. No. 1330 of 1981.
21 *st December,* 1981.

when he was arguing the case. It is not clear as to when the party approached him and when he gave the impression that an application had to be filed. As there is some likelihood of some mistake as to what the parties had to do, it is proper to give the petitioner an opportunity to tender appropriate evidence in explaining the delay in the Court below. [*Para*. 7.]

Case referred to:—

P. S. Angayya Raja, a firm by Partner v. *A. K. D. Alaguraja Hakdar of Rajapalayam Chatram Charities,* 1976 T.L.N.J. 21.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Madurai, dated 9th December, 1980 and made in E.A. No. 1198 of 1979, in E.P. No. 93 of 1978 in O.S. No. 379 of 1976.

S. Ramalingam, N. Thiagarajan and *G. Manjula,* for Petitioner.

A. Shanmughavel and *Jayalakshmi Shanmughavel,* for Respondents.

The Court delivered the following

JUDGMENT.—This civil revision petition has been filed against the order of the Subordinate Judge in Madurai in E.A. No. 1198 of 1979, which was an application filed on behalf of the third defendant in O.S. No. 379 of 1976, under section 5 of the Limitation Act, 1963. The plaintiff filed the suit against her for recovery of a sum of Rs. 7,450 due on a mortgage for a sum of Rs. 5,000. The third defendant claimed that she was entitled to the benefits of the Tamil Nadu Debt Relief Act, XL of 1979. This Act came into force on the 15th of July, 1979. It was published in the Official Gazette on 13th June, 1979. By section 21 of the said Act, it was provided that where, in execution of any decree, any immovable property in which a debtor entitled to the benefits of the Act had an interest, had been sold on or after the 14th day of July, 1978, then notwithstanding anything contained in the Limitation Act, 1963, and notwithstanding that the sale had been confirmed, any judgment-debtor claiming to be entitled to the benefits of the Act, may apply to the Court within ninety days from the date of the publication of the Act in the Tamil Nadu Government Gazette, to set aside the sale and the Court should, if it is satisfied that the applicant was a debtor entitled to the benefits of the Act, order the sale to be set aside and thereupon, the sale would be deemed not to have taken place at all. Before passing such an order, it was necessary to give notice to the auction-purchaser and other persons interested in the sale. In the present case, the sale took place on 27th November, 1978. The sale having taken place after 14th July, 1978, section 21 would *prima facie* apply. The third defendant filed the application only on 18th September, 1979. Calculated from 13th June, 1979, the last day for the filing of the application would be 11th September, 1979. There was thus a delay of seven days in filing the application.

2. In explanation of this delay, in the affidavit in support of the application it was stated:—

> "Today I am filing an application under section 21 of the Act XL of 1979. Under section 21 of the Act, 1979, I ought to have filed the application on or before 13th September, 1979. My advocate has been under the *bona fide* mistaken impression that since that Act had come into force on and from 15th July, 1979, I am entitled to file that application till 15th October, 1979. On the night of 14th September, 1979, when we were preparing the petition, it had been noticed that ninety days have to be calculated from the date of publication of the Act and I ought to have filed the application before 13th September, 1979. Since 15th to 17th were holidays, I am filing this application today (18th). Consequently, there is a delay of 4 days in filing the application under section 21 of Act XL of 1979. Hence I am filing this application to excuse the delay of four days in filing this application".

A counter-affidavit was filed by the decree-holder and the Court below held that the third defendant had not produced any affidavit from the Advocate who had advised her wrongly, as was done in (*P. S. Angayya Raja, a firm, by Partner* v. *A. K. D. Alagu Raja Hakdar of Rajapalayam Chatram Charities*[1])

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1. 1976 T.L.N.J. 21.

That decision appears to have been relied on, on behalf of the third defendant. The learned Subordinate Judge held that the application was not filed within time and that the application to excuse the delay could not be accepted. It is this order that is sought to be challenged by the third defendant in the present revision petition.

3. Mr. Ramalingam, learned counsel for the revision petitioner, contended that there was a *bona fide* mistake on the part of the Advocate who advised the third defendant and that in such a case, the delay should have been excused. For the respondents, Mr. A. Shanmugavel contended (*i*) that the provisions of the Limitation Act, did not apply to this case; and (*ii*) that, in any event, the delay has not been properly explained in the affidavit.

4. With reference to the first submission, learned counsel for the respondents referred me to the provisions of section 21 of Tamil Nadu Debt Relief Act (XL of 1979). That section runs as follows:—

> "Where, in execution of any decree, any immovable property in which a debtor entitled to the benefits of the Act had an interest, had been sold or foreclosed on or after the 14th day of July, 1978, then, notwithstanding anything contained in the Limitation Act (XXXVI of 1963), or in the Code of Civil Procedure (V of 1908) and notwithstanding that the sale had been confirmed, any judgment-debtor claiming to be entitled to the benefits of this Act, may apply to the Court within ninety days from the date of the publication of this Act in the Tamil Nadu Government Gazette, to set aside the sale and the Court should, if it is satisfied that the applicant was a debtor entitled to the benefits of this Act, order the sale to be set aside and thereupon, the sale or foreclosure shall bedeemed not to have taken place at all".

According to him, the expression, "notwithstanding anything contained in the Limitation Act, 1963," rules out of consideration the entire Limitation Act, including section 5 thereof. If so, in his submission, we are left only with section 21 of the Act, which provides only a period of ninety days and, so long as this application was not filed within that period, there is no question of the sale being set aside. For the petitioner, Mr. Ramalingam submitted that the relevant words, namely, "notwithstanding anything contained in the Limitation Act, 1963" were introduced into the Act only to see that there was no conflict between section 21 of the Act and Article 127 of the Limitation Act. Article 127 of the Limitation Act, provides for a period of sixty days from the date of the sale, for setting aside the sale in execution of a decree, including any such application by a judgment-debtor. As a different period was provided for in section 21, the submission is that the words, "notwithstanding anying contained in the Limitation Act, 1963", were introduced so as to get Article 127 out of the way.

5. I consider there is substance in this submission. The Legislature did not completely rule out of consideration the entire Limitation Act. The words have to be understood only in the context of avoiding a conflict between the Limitation Act and section 21 of the Tamil Nadu Debt Relief Act XL of 1979. Further, there is also the expression, "notwithstanding anything contained in the Code of Civil Procedure, 1908", occurring in this very section. It does not mean that the whole Code of Civil Procedure is to be excluded, in which event, the executing Court which functions under the Code will have no part to play. For the above reasons, I do not find it possible to accept the submission of Mr. Shanmugavel that the entire Limitation Act including section 5 is barred from consideration in the present case.

6. As regards the second point of explanation regarding the delay, the relevant paragraph in the affidavit has already been extracted above. The contention of Mr. Shanmugavel is that the petitioner had gone to the Advocate only on 14th September, 1979, and that she could not have had any inkling of the Advocate's impression prior to that date. As 14th September, 1979, itself is outside the period of ninety days, there is no question of any condonation of delay because the entire delay is due to the laches on the part of the petitioner herself. For the petitioner, the submission was that the Advocate who drafted the affidavit had himself argued in the Court below that there was a mistake on his part. If really an affidavit from him was

called for, or his evidence was to be recorded, he would have been in a position to explain the matter.

7. It is possible that there was some misapprehension on the part of the Advocate that it was enough for him to explain the delay when he was arguing the case. It is not clear as to when the party approached him and when he gave the impression that the application had to be filed by 15th October, 1979. As there is some likelihood of some mistake as to what the parties had to do, I think it proper to give the petitioner an opportunity to tender appropriate evidence in explanation of the delay in the Court below. The petition is accordingly allowed and the matter, remanded to the executing Court for taking evidence on the question of delay and dispose of the execution application in accordance with law. There will be no order as to costs.

R.S. ——— *Matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *G. Ramanujam, J.*

Amirthammal and others .. *Appellants**

v.

M. K. Mani Iyer .. *Respondent.*

(A) *Decree—Construction—Decree passed by trial Court for specific performance—Restoration of decree by High Court in second appeal, subject to certain additional conditions — Decree, nature of — Whether preliminary decree or final decree.*

(B) *Limitaion Act (XXXVI of* 1963), *Articles* 136 *and* 137—*Applicability.*

Held: The High Court in second appeal had restored the decree passed by the trial Court for specific performance of an agreement of reconveyance subject to addition of certain conditions, namely, that the plaintiff was liable to pay additional amounts directed to be ascertained over and above the sale consideration and the final decree shall be passed thereafter. The trial Court had granted a decree for specific performance on condition that the plaintiff deposited the amount of sale consideration within a specified time and that had been paid by the plaintiff in pursuance of the decree in the second appeal. But as something, more had to be done to ascertain the additional liability of the plaintiff under the High Court decree, the decree can be taken to be only a preliminary decree. Once the decree is treated to be a preliminary decree, then, on the analogy of partneship suits and saits for accounts, Articles 136 and 137 of the Limitation Act, will not apply. On the wordirg of Article 136 of the Limitation Act the period of limitation will begin to run only when the decree becomes enforceable. As the decree is a preliminary decree and not executable straightaway, the application for passing final decree is not barred. It is well-established that there is no time limit for filing an application for passing a final decree. An application for passing a final decree is not an application in execution and the question of execution will arise only if the decree is final and executable. [*Para.* 16.]

Cases referred to:—

Abdul Shakir Sahib v. *Abdul Rahiman Sahib,* (1923) I.L.R. 46 Mad. 148: 44 M.L.J. 107: 17 L.W. 216: A.I.R. 1923 Mad. 284; *Sandhyarid Rani* v. *Sudha Rani,* (1978) 1 S.C.J. 464: (1978) 2 S.C.R. 839: (1978) 2 S.C.C. 116: A.I.R. 1978 S.C. 537; *K. Kalpana Saraswathi* v. *P. S. S. Somasundaram Chettiar,* (1980) 1 S.C.C. 630: (1980) 2 S.C.R. 293: A.I.R. 1980 S.C. 512; *Saraswathi* v. *Somasundaram,* (1977) 2 M. L. J. 68; *K. S. Doraiswami Nadar* v. *Vinayaka Ratnaswami Nadar,* (1969) 1 M.L.J. 392; *Balakrishna and Sons* v. *State of Madras,* (1961) 1 S.C.J. 712: (1961) 1 An.W.R. (S.C.) 207: (1961) 1 M. L. J. (S. C.) 207: (1961) 2 S.C.R. 136: A.I.R. 1961 S.C. 1152.

Appeal against the Decree of the District Court, Coimbatore East at Erode dated 10th October, 1977 in Appeal Suit No. 242 of 1976 preferred against the decree of the Court of the District Munsif, Erode in I.A. No. 667 of 1973 in O.S. No. 291 of 1952.

K. Alagiriswami and *A. Veeraswami,* for Appellants.

*S.A. No. 2648 of 1977.

25th September, 1981.

N. Sivamani and *N. Krishnamitra*, for Respondent.

The Court delivered the following

JUDGMENT.—Legal Representatives of the first defendant in O. S. No. 291 of 1952 on the file of the District Munsiff, Erode who were unsuccessful in both the Courts below are the appellants herein.

2. The respondent herein filed the said suit for specific performance of an agreement of reconveyance. One Mariappan, Rajagopalan and Angappan had sold the property covered by that suit to the first defendant under a sale deed dated 19th February, 1946. On 20th February, 1946, the vendee, the first defendant, had executed an agreement of reconveyance in favour of the vendors, Mariappan and others. The vendors had executed a mortgage of the right of reconveyance to the vendee. One Kuppayammal, the mother of the first defendant had filed a suit O. S. No. 290 of 1949 against Mariappan the third defendant and obtained a decree. In execution of that decree the second defendant had attached the said right to obtain reconveyance. In pursuance of that attachment that right was brought to sale and purchased by the first defendant on 16th April, 1952. The sale was confirmed. Since the other two vendors, Rajagopalan and Angappan were not parties to the said suit O. S. No. 290 of 1949, the first defendant, as a result of the Court-auction-purchase could obtain only 1/3rd right in the reconveyance, belonging to Mariappan. The plaintiff had obtained an assignment of the reconveyance from Rajagopalan and Angappan under a deed Exhibit 4 dated 5th October, 1951. Similarly, under ExhibitA-5 dated 11th February, 1952, the plaintiff obtained an assignment of the said right from the third defendant but this was after the attachment was effected in O. S. No. 290 of 1949 and hence it is ineffective. It is in these circumstances the plaintiff filed the suit O. S. No. 291 of 1952 for specific performance of the agreement of reconveyance in respect of the entire suit property or in the alternative in respect of 2/3rd share belonging to Rajagopalan and Angappan and for recovery of possession.

3. In the said suit, defendants 3 and 4 remained *ex parte* and it was resisted only by defendants 1 and 2. The defence taken by them was that the plaintiff is not entitled to obtain a reconveyance without redeeming the mortgage over the right of reconveyance by paying the proportionate share of his assignors, Angappan and Rajagopalan and that the plaintiff is entitled to reconveyance of the share of Angappan and Rajagopalan only on payment of *Prorata* share of the reconveyance amount.

4. The trial Court passed a decree directing the first defendant to execute a deed of reconveyance of the suit property in favour of himself and the plaintiff on the plaintiff depositing a sum of Rs. 1,450 into Court within a period of one month. On appeal, the lower appellate Court took the view that the right to get a reconveyance from Angappan and Rajagopalan stood extinguished and that, the plaintiff is not in any event entitled to a reconveyance without redeeming the mortgage over the right of reconveyance or paying the proportionate share of his assignors, Angappan and Rajagopalan. In that view the lower appellate Court reversed the decree of the the trial Court and dismissed the suit.

5. The matter was taken in Second Appeal No. 262 of 1956 to this Court. In the second appeal the plaintiff had no objection for a decree being passed subject to the plaintiff paying his vendors' share of the mortgage money and on his complying with such equitable terms and conditions as may be imposed by the Court. This Court by its judgment dated 13th November, 1958, set aside the decree and judgment of the lower appellate Court and restored the decree and judgment of the trial Court subject to the following terms:

"1. The trial Court do ascertain the exact amount payable to the first defendant under the decree in O.S. No. 290 of 1949 and 710 of 1948 on the file of the Court of the District Munsif, Erode upto date and the plaintiff has to pay 2/3rd of the same to the first defendant.

2. In respect of the mortgage amount of Rs. 700 and interest accrued thereon at 12% per annum from the date of the

mortgage *viz.*, 30th March, 1946, the plaintiff shall pay 2/3rd to the first defendant.

3. The plaintiff if entitled to get credit of a sum of Rs. 483-5-4 being the 1/3rd of the sum of Rs. 1,450 deposited as the sale consideration for the right of conveyance.

4. The plaintiff is entitled to mesne profits from 10th February, 1954, the date of deposit of Rs.1,450 and the same will be ascertained by the trial Court under Order 20, rule 12, Civil Procedure Code.

5. The amount due to the plaintiff by way of mesne profits and the sum of Rs. 483-54 which has to be given credit to the plaintiff as the 1/3rd of the amount deposited will be set off against the amounts to be determined as ultimately payable by the plaintiff.

6. The trial Court will a pass a final decree after the amounts due under the above clauses were ascertained in favour of the party entitled."

6. After the amounts have in fact been ascertained as per the said decree of this Court, an application, I. A. No. 667 of 1973 was filed by the plaintiff for passing a final decree directing the first defendant's legal representatives, appellants 1 to 6 herein to execute a deed of reconveyance as regards the 2/3rd share of the suit property and put the plaintiff in joint possession of the same, or in the alternative, to divide the suit lands into three shares and allot two such shares to the plaintiff with past and future mesne profits from the date of the final decree.

7. The said application was opposed by all the appellants herein contending as follows: Since the plaintiff did not ask for the execution of conveyance and for possession within three years from the date of judgment and decree dated 13th November, 1958 in Second Appeal No. 262 of 1956 the present application was barred. The right to get joint possession was also barred, and consequently the plaintiff was not entitled to mesne profits since the decree was not a preliminary decree. The said decree of the High Court dated 13th November, 1958, is a final and executable decree and not a preliminary decree. As the same was not executed within three years as provided in Article 182 of the Limitation Act, the decree cannot be executed in 1973 after a period of 12 years as provided in section 48, Civil Procedure Code. Further, the decision of the High Court in C.R.P. No. 671 of 1965 which has concluded the rights of parties in relation to the decree for specific performance and the right to have a sale deed executed in his favour. Hence, it operates as *res judicatta* to the plaintiff's application for passing a final decree.

8. On these rival contentions, the trial Court framed the following points for consideration: (1) Whether the decree granted in favour of the plaintiff for getting the sale deed in his favour has become barred as contended by the appellants as the plaintiff had not filed a petition for execution within three years from 13th November, 1958, the date of judgment in the second appeal in the High Court; and (2) What is the amount payable by the plaintiff to the respondents (appellants) as per clauses 1 to 6 in the said decree 13th November, 1958, in S.A. No. 262 of 1956 of High Court, Madras. On the first point the trial Court held that the decree passed by the High Court is only a preliminary decree and, therefore, there is no question of limitation for filling an application for passing a final decree. On the second point the trial Court held that a sum of Rs. 1,639.90 is liable to be paid by the plaintiff to the respondents and in that view the plaintiff was directed to deposit the said sum of Rs. 1,639.90 on or before 21st October, 1976. The plaintiff having deposited the amount on 13th October, 1976, the trial Court passed a final decree directing the appellants herein to execute a sale deed in favour of the plaintiff as regards 2/3rd share of the suit property and to put the plaintiff in joint possession of the same along with the appellants within 2 months failing which the plaintiff will be at liberty to get the sale deed executed through Court. The plaintiff was also given liberty to move the Court for partition and separate possession of his 2/3rd share on the execution of the sale deed.

9. The respondents (appellants) took the matter in appeal to the lower appellate Court mainly questioning the finding of the trial Court that the decree passed in the

suit is a preliminary decree and therefore it is not barred by time. The quantification of the amount by the trial Court as payable by the plaintiff has not been questioned though a contention had been raised that the claim of the plaintiff relating to mesne profits was also barred by time. The lower appellate Court took the view that there is no merit in the contention that the decree passed by the trial Court as early as 16th January, 1954, which has been restored by the decree of the High Court in S.A. No. 262 of 1956 is a final decree capable of execution and as the plaintiff has not executed the said decree for specific performance within the time prescribed by law, the present application for passing a final decree and to have the sale deed executed is barred by time, and that in view of the direction to assess the quantum of mesne profits under Order 20, rule 12, Civil Procedure Code, by the High Court it would itself clearly indicate that the claim for mesne profits cannot be said to be barred by time. The lower appellate Court therefore affirmed the order of the trial Court passing a final decree directing the appellants to execute the sale deed in pursuance of the decree for specific performance and fixing the mesne profits. In this second appeal the appellants (respondents before the Courts below) have raised the only contention that the application for passing a final decree is barred by time as the decree of the trial Court dated 16th January, 1954, which had been restored by a decree of the High Court in S.A. No. 262 of 1956 is a final decree capable of execution and, therefore, it should have been executed within three years from the date of the High Court's judgment as provided in Article 182 of the Limitation Act, and that in any event the 12 year's time having elapsed since the date of the High Court's judgment, no execution is possible and its execution is barred by section 48 of the Code of Civil Procedure. Therefore, the main question that comes up for consideration here is whether the decree passed by the trial Court which has been restored by the High Court in Second Appeal No. 262 of 1956 on 13th November, 1958, subject to certain conditions is a preliminary decree as contended by the plaintiff or whether it is a final decree as contended by the appellants.

10. The learned counsel for the appellants would refer to the following observations of Anantanarayanan, CJ. when the same matter came before this Court in C. R. P. No. 671 of 1965 in support of his stand that the decree of the trial Court as regards specific performance is a final decree:

> "Admittedly the deposit of Rs. 1,458 by the plaintiff had occurred even prior to the disposal of the second appeal. Consequently as far as this aspect is concerned, the restoration of the decree of the trial Court would appear to entitle the plaintiff to ask for the execution of the conveyance and to ask for possession forthwith from the date of the judgment in second appeal."

But the learned Chief Justice has subsequently observed:

> " I am not deciding one way or the other whether the judgment and decree in second appeal referred to should be construed as partly preliminary and partly final or as totally preliminary as contended by Mr. Mohan. Now I am deciding whether the decree for possession is now time-barred or otherwise."

11. It is not, therefore, possible to take the decision of Anantanarayanan, CJ. as holding that the decree of the trial Court which has been restored by the High Court in S. A. No. 262 of 1956 is a final decree. That question has to be decided without reference to the said observations that the plaintiff is entitled to ask for the execution of the sale deed and for joint possession from the date of the decree in the second appeal.

12. A perusal of the decree in S. A. No. 262 of 1956 in a way indicates that the decree of the trial Court which has been restored by the High Court can only be a preliminary decree. The operative portion which is clause (1) of the High Court's decree is as follows:—

> " That the decree of the lower appellate Court be and hereby is set aside and that of the Court of the first instance be and hereby restored subject to the term mentioned in the following clauses 2 and 3"

Clauses 2 and 3 relate to the plaintiff's liability to pay his share of the decree

amount in O. S. No. 290 of 1949 and O. S. No. 710 of 1948 and his liability to pay a portion of his share of the mortgage money payable on the mortgage, Exhibit B-2. Clauses 4 to 6 relate to the plaintiff's right to get mesne profits and the other amounts which have to be given credit to him against his liability under clauses 2 and 3. Clause 8 of the decree is as follows:—

> "That the trial Court do pass a final decree after the amounts due under clauses 2 to 6 supra were ascertained in favour of the party entitled."

Therefore, the decree proceeds on the basis that the trial court decree which has been restored by the High Court is a preliminary decree and the final decree has to be passed only after the amounts due by the plaintiff to the first defendant had been determined. The expression "subject to" used in clause (1) of the decree would mean that the restoration of the trial Court's decree is conditional upon the observance of the conditions set out in clauses 2 and 3. The expression "subject to" has been construed as conditional upon by the Supreme Court in *Balakrishna & Sons* v. *State of Madras*.[1]

13. The judgment of the High Court in S.A. No. 262 of 1956 also throws some light on this question. The Court refers to a memo filed by the first defendant/respondent in the appeal and the plaintiff having expressed no objection for a decree being passed embodying the terms set out in the memo. of the first defendant. The Court observes:

> "The learned advocate for the appellant intimates that his client has no objection for a decree being given embodying the terms contained in paras. 1 and 2 of the memo. and that with reference to paragraph 3 the question of mesne profits should be gone into at the time of the passing of the final decree by the trial Court, treating the decree to be passed by this Court as a preliminary decree and for which position there is warrant in the decision in *Abdul Shakir Sahib* v. *Abdul Rahiman Sahib*".[2]

The above observation also indicates that both the parties as also the Court proceeded on the basis that the decree of the High Court which restores the decree of the trial Court should be taken to be a preliminary decree and the rights of parties have to be worked out on that basis in the final decree.

14. The contention of the learned counsel for the respondents is that apart from the intrinsic light thrown by the judgment and decree in S.A. 262 of 1956 as to the nature of the decree passed by the High Court, having regard to the fact that the trial Court's decree has been restored subject to certain conditions, unless the conditions are fulfilled the decree of the trial Court cannot be effective and enforceable, and it is only when all the conditions referred to in the High Court's decree are satisfied, the decree will become a final decree and executable. There is considerable force in the said submission of the learned counsel. Under clauses 2 and 3 of the High Court's decree the plaintiff has been made liable to pay certain additional amounts apart from the sale consideration of Rs. 1,450 deposited already before the trial Court. In this case the amounts payable by the plaintiff to the respondents under clauses 2 and 3 of the decree came to be determined only in I. A. No. 667 of 1973 out of which the present appeal arises. Therefore, it is only after determination of the amounts due by the plaintiff under clauses 2 and 3 and a final decree is passed on that basis the plaintiff could ask for execution of the sale deed and not before. It may be that under the trial Court's decree as originally passed the plaintiff could ask for a sale deed treating the same as final, for the plaintiff's liability as per the trial Court's decree is only to deposit a sum of Rs. 1,450 and there was no further liability. But the said decree has been restored and modified by the decree of the High Court. The modification is that the decree of the trial Court directing the execution of the sale deed is made subject to the plaintiff paying certain additional amounts in addition to the deposit of sale consideration which has already been made. The decree of the High Court specifically says that the additional amount due by the plaintiff in addition to the sale consideration will have to be ascertained in the final decree proceedings. Therefore,

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1. (1961) 1 S.C.J. 712: (1961) 1 An.W.R. (S.C.) 207: (1961) 1 M.L.J. (S.C.) 207: (1961) 2 S.C.R. 736: A.I.R. 1961 S.C. 1152.

2. (1923) I.L.R. 46 Mad. 148: 44 M.L.J. 107: 17 L.W. 216: A.I.R. 1923 Mad. 284.

the plaintiff's right to get a sale deed could not arise unless the conditions under which the decree has been restored are complied with. The restoration of the decree of the trial Court by this Court is not independent of the conditions set out in the other clauses of the decree.

15. The learned counsel for the appellants however contends that a decree may be partly preliminary and partly final, and that the decree of the trial Court in this case should be taken to be partly preliminary and partly final. According to the learned counsel, the portion of the decree providing for the execution of the sale deed on deposit of the amount is a final decree though the other portion of the decree directing the ascertainment of the amounts payable by the plaintiff to the defendants can be taken to be preliminary. It is true, in certain cases it is possible to construe a decree as partly preliminary and partly final. But in this case since the decree of the trial Court has been restored subject to the condition that the plaintiff's liability to pay additional amounts to the defendants is determined, the decree as modified by the High Court is only a preliminary decree.

16. The learned counsel for the appellants places strong reliance on a decision of the Supreme Court in *Sandhya Rani* v. *Sudha Rani*[1] in support of his general submission that a decree passed in a suit for specific performance can only be a final decree. In that case a contract of sale was to be completed by April, 1956. However, the sale was not completed even though the plaintiff called upon the defendant to complete the transaction. The plaintiff thereafter filed a suit and the suit was decreed on 30th April, 1962. Under the decree the plaintiff was required to deposit the balance of the consideration within 30 days of the date of the decree. However, she did not deposit the amount within that date. She asked for extension of time, and the extension of time sought for was given by the Court on condition that in the event of default of deposit, the suit would stand dismissed. The question arose as to whether the order extending the time for deposit on condition that in the event to default the suit will stand dismissed is a preliminary decree or a final decree. The Supreme Court observed:

> "To assert that the decree made in a suit for specific performance of contract for sale of immovable property calling upon the purchaser to deposit the balance of consideration within the time stipulated in the decree with super-added condition that in the event of default the suit would stand dismissed, is a preliminary decree, is to ignore the relevant provisions of the Code of Civil Procedure which require in certain types of suits to pass preliminary decree. In such a suit when contented, each party would be accusing the opposite party of committing breach of contract. The right to ask for specific performance of contract would be adjudicated upon and in fact in this case it was adjudicated upon. The trial Court did call upon the defendant to execute the conveyance on receipt of consideration. Such a decree could never be said to be preliminary decree".

Based on the said judgment it is the submission of the learned counsel that a decree calling upon the defendant to execute a conveyance on receipt of consideration could never be said to be a preliminary decree. As already stated, if the decree of the trial Court directing the execution of the sale deed on the plaintiff depositing the amount of consideration stood as it is, it cannot be construed to be a preliminary decree as per the said decision of the Supreme Court. But in this case the decree of the trial Court has been restored by the High Court subject to the condition that the plaintiff's liability to pay additional amounts in addition to the sale consideration is to be ascertained and the final decree should be passed thereafter. Therefore, the said decision of the Supreme Court cannot apply to the facts of this case where the decree of the trial Court as restored and modified by the High Court is one which does not determine fully the amount to be deposited by the plaintiff for getting the sale deed executed by the defendants. As a matter of fact, the facts of this case will attract the principle laid down by the Supreme Court in a

1. (1978) 1 S.C.J. 464; (1978) 2 S.C.R. 839; (1978) 2 S.C.C. 116; A.I.R. 1978 S.C. 537.

ater decision in *K. Kalpana Saraswathi* v. *P. S. S. Somasundaram Chettiar*[1]. In that case 'A' had agreed to sell his house to '*B*' in 1967 for a sum of Rs. 4 lakhs which was subject to an equitable mortgage in favour of a Bank. The trial Court decreed to suit for specific performance directing *A* to deposit the mortgage amount within a specified time with interest and that failure to pay the amount would result in the suit being dismissed. *A* did not deposit the mortgage amount within the prescribed time. But later the mortgage amount due to the Bank had been paid and an assignment of the mortgage had been obtained by *A*. A Division Bench of this Court in *Saraswathi* v. *Somasundaram Chettiar*[2] out of which the appeal before the Supreme Court arose while holding that the direction to make a deposit into Court within three months was valid, vacated the default clause, namely the dismissal of the suit on non-payment within the time. When the matter was taken up to the Supreme Court, the Supreme Court took the view that having regard to section 28 of the Specific Relief Act the proper course in such cases is to pass a decree for specific performance which would for all practical purposes be a preliminary decree and the suit would continue to and be under the control of the Court until appropriate motion was made by either party for passing a final decree. The learned counsel for the respondent refers to this decision of the Supreme Court and submits that in all cases where time is granted for deposit of the sale consideration for getting a decree for specific performance, the decree should be taken to be a preliminary decree. As already pointed out, in this case, though the trial Court gave a decree for specific performance on condition that the plaintiff deposits the amount of sale consideration within a specified time and that has been paid, the further amounts have to be paid by the plaintiff in pursuance of the decree in S.A. No. 262 of 1956. Therefore, as something has to be done to ascertain the additional liability of the plaintiff, the decree can be taken to be only a preliminary decree. In *Abdul Shakur Sahib* v. *Abdul Rahiman Sahib*[3] a Division Bench of this Court had held that where, in a suit for specific performance of a contract for sale of certain lands, the original Court passed a decree directing the defendant to execute a conveyance on the plaintiff paying the price within a certain time, the decree is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases the extension of the time limited by the decree. It is, therefore, not possible for me to accept the contention of the appellants that the decree of the trial Court directing execution of the sale deed should be taken to be a final decree and as such executable. Once the decree is treated to be a preliminary decree, then on the analogy of partnership suits and suits for accounts, Articles 136 and 137 of the Limitation Act will not apply. In *K. S. Doraiswami Nadar and others* v. *Vinayaka Ratnaswami Nadar and others*[1] a Division Bench of this Court had held that an application for passing final decree in a partition suit is not in execution and as such number of applications for passing a final decree in parts are permissible and neither Article 136 nor Article 137 of the Limitation Act would apply to applications for passing final decrees, and that the position is so well established that it is hardly necessary to refer to any authority. Even otherwise, on the wording of Article 136 of the Limitation Act the period of limitation will begin to run only when the decree becomes enforceable. As it has already been held that the decree is only preliminary and not executable straightaway, the application for passing a final decree is not barred. It is well-established that there is no time-limit for filing an application for passing a final decree. An application for passing a final decree is not an application in execution and the question of execution will arise only if the decree is final and executable. In this view of the matter, I am inclined to agree with the conclusion arrived at by both the courts below.

17. The result is the second appeal fails and is dismissed. There will, however, be no order as to costs.

R. S. —— *Second appeal dismissed.*

1. (1980) 1 S.C.C. 630: (1980) 2 S.C.R. 293: A.I.R. 1980 S.C. 512.
2. (1977) 2 M.L.J. 68.
3. (1923) I.L.R. 46 Mad. 148: 44 M.L.J. 107.

1. (1969) I M.L.J. 392.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

P. R. Panduranga Chettiar .. *Petitioner**

v.

Ezumalai and Kannan *alias* Anna Stores represented by Ezumalai and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 50—Death of judgment-debtor during the pendency of execution proceeding—Transmission of decree from District Munsif's Court Vellore to District Munsif's Court Arni—Application by decree-holder to implead the legal representatives of the judgment-debtor made in Arni Court—Application rejected—Application before the District Munsif's Court Vellore also dismissed—Dismissal by latter Court set aside.

Held: Section 50 of the Code of Civil Procedure clearly states that in case where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree is entitled to apply to the Court which passed the decree to execute the same against the legal representatives of the deceased. Therefore the order of the District Munsif, Vellore dismissing the application to bring on record the legal representatives of the deceased judgment-debtor is set aside and he is directed to implead the legal representatives. [*Para.* 2.]

Case referred to:—

Swaminatha Ayyar v. *Vaidyanatha Sastri*, (1905) I.L.R. 28 Mad. 466: 15 M.L.J. 116.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the Order of the Court of the District Munsif, Vellore dated 24th January, 1980 and made in E.A. No. Nil of 1980 G. No. 20832 of 1979 in O.S. No. 96 of 1961.

M. N. Padmanabhan, for Petitioner.

Manivannan, for Respondent.

The Court made the following

ORDER.—This revision petition is filed against the order of the District Munsif, Vellore, passed in G. No. 20832, dated 12th November, 1979, filed by the decree-holder seeking to implead the legal representatives of the judgment-debtor (2nd defendant) who died pending the execution of the decree. It seems the decree had been transferred from the District Munsif Court, Vellore to the District Munsif Court, Arni and it has to be noted that this is 12 years application. On the death of the second defendant, the decree-holder filed an application for impleading the legal representatives before the District Munsif Court, Arni in O.E.A. No. 22 of 1979 in O.E.P. No. 525 of 1973. The learned District Munsif, Arni, seems to have passed an order stating that the Court, which passed the decree, could alone implead the legal representatives and dismissed the said application. Consequent on the said order, the decree-holder filed an application before the District Munsif, Vellore who passed the decree, for impleading the legal representatives. The learned District Munsif, Vellore, dismissed the application on the ground that the execution petition is pending before the District Munsif Court, Arni.

2. The order of the learned District Munsif Vellore is incorrect. Section 50 of the Code of Civil Procedure, clearly states that in case where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree is entitled to apply to the Court which passed the decree to execute the same against the legal representative of the deceased. In a case reported in *Swaminatha Ayyar* v. *Vaidyanatha Sastri*[1], this Court laid down that in a case where the decree had been transferred to some other Court, the Court that passed the decree has got jurisdiction to implead the legal representatives. Therefore, the order of the learned District Munsif, Vellore is set aside and he is directed to implead the legal representatives of the second defendant.

*C.R.P. No. 1635 of 1980. *17th December,* 1981.

1. (1905) I. L. R. 28 Mad. 466: 15 M.L.J. 116.

3. In the result, the civil revision petition is allowed. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. Fakkir Mohammed, J.*

Chithiraivadivu Ammal .. *Petitioner**

v.

Dr. Moses T. Sundar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *(as amended by Act XXIII of* 1973), *sections* 10 (2) (1) *and* 10 (3) (a) (i)—*Payment of rent by tenant in lump sum for* 11 *months, whether amounts to wilful default.*

Held, in this case it cannot be said that the tenant has committed any wilful default as the landlady had let the tenant believe that he might remit the rents in lump sum and had been receiving the rent in lump sum from about the year 1955 till the notice was issued for the first time in 1976. [*Para.* 13.]

So far as the requirement for own use is concerned, it is true that in case a landlord or landlady required the premises for own occupation, the question of *bona fides* is alien for consiedration, unless there are compelling circumstances to disbelieve the revision of the landlord or landlady. [*Para.* 15.]

Cases referred to:—

Komalam Ammal v. *Ashoka Cycle and Motor Company,* (1980) 1 M.L.J. 194; *Basappa* v. *Jumnadass,* (1979) 1 M. L. J. 317; *Nagalinga Josier* v. *The Trust,* (1972) 2 M.L.J. 623: 85 L.W. 738; *Anandayee Ammal* v. *S. M. Khaja and Company,* (1967) 1 M.L. J 368: 80 L.W. 225.

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), praying the High Court to revise the Order of the Court of the Subordinate Judge, Tirunelveli (Principal) (Appellate Authority), dated 24th September, 1980 and passed in C.M.A. No. 2 of 1979 (R.C.O. P. No. 123 of 1977, DMC Tirunelveli) Rent Controller.

S. Desikan, for Petitioner.

B. Kumar, for Respondent.

The Court made the following

ORDER.—In this case the revision petitioner is the landlady who has filed H.R.C.O.P. No. 123 of 1977 on the file of the Rent Controller, Tirunelveli for eviction of the tenant, who is a medical practitioner on the ground of wilful default in the payment of arrears of rent for 11 months between September, 1976 and July, 1977 to the tune of Rs. 705 deducting Rs. 10 paid in excess for August, 1976. The contention of the landlady before the Rent Controller was that the tenant is a chronic wilful defaulter in the payment of rent and that he has committed wilful default as mentioned above in the payment of 11 months rent.

2. The plea of the tenant is that the landlady had requested him to make lumpsum payment stating that if payments are made monthly they would be spent away and that even though the tenant was paying the rent in lumpsum in the past, the landlady was received the same without any demur.

3. After a fulfledged enquiry, the Rent Controller found that the landlady had led the tenant believe that he should pay the rent in lumpsum, that there was no wilful default in the payment of rent. The landlady had also added another ground that the building was required for her own occupation for the purpose of education of her children at Tirunelveli. The plea of the tenant is that the requirement for educating the children is not a *bona fide* one and that the landlady's intention was to let out the premises for higer rent.

4. Still another ground stated in the petition was that even though the building was let out for residential purpose, the tenant has been using the residence as a clinical laboratory also. The learned Rent Controller has found that the evidence in the proceedings revealed that the children of the landlady might study only in the tutorial college at Tirunelveli, that P.W. 2 had stated that he

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*C.R.P. No. 1851 of 1981.

24th December, 1981.

did not know the tutorial college, where their sons are studying and that in Exhibit A-12 letter, dated 1st June, 1974 the purpose of the requirement of the building was stated as for managing the property as well as for higher education and that therefore the requirement of the landlady was not true and *bona fide*.

5. Regarding the use of the premises as a clinicial laboratory is concerned, the evidence disclosed that a major portion of the building was utilised by the doctor-tenant for residential purposes only, even though the room was utilised as a clinic and that the landlady admitted in evidence that the tenant had taken the building mainly for running a clinic. Therefore, the learned Rent Controller has found that the third ground stated in the petition is not a real ground. Accordingly, the eviction petition was dismissed.

6. The tenant had remitted the entire 11 months rent immediately after receipt of the notice from the landlady.

7. On appeal to the appellate authority, namely, the Principal Subordinate Judge, Tirunelveli, the findings of the Rent Controller have been confirmed in C.M.A. No. 2 of 1979 by order, dated 24th September, 1980. Hence this revision.

8. The main grounds that are urged in the revision are that both the Courts have failed to properly consider the continuous wilful default committed by the tenant in the payment of rent, that the lower Court had fallen into an error in turning down the *bona fide* requirements of the premises for the landlady's own occupation. The alleged misuse of the premises for running a clinical laboratory is not urged in revision.

9. The facts that the tenant is a doctor, who has been occupying the building from 1955, that the monthly rent was Rs. 45 initially and that the tenant was paying the rent in lumpsum from the inception are evident from Exhibits B-1 to B-31 and the said fact has been considered by both the Courts below. The husband of the landlady is a teacher employed at Shencottah and both of them have been residing at Shencottah. P.W. 1 does not dispute the fact that the lumpsum payment of rent by the tenant, who is a doctor was received without any demur and there is no document to show that between 1955 and 1976 the landlady, whose husband is a teacher ever requested the tenant to pay the rents every month instead of sending in lumpsum. The plea and the evidence of the tenant is that the landlady and her husband were quite cordial and had requested the tenant to pay the rent in lumpsum so that the rents could be saved. Thus, the evidence both oral and documentary has proved the above defence set up by the respondent.

10. P.W. 1 has admitted that only for the purpose of admitting her sons in a tutorial college in Tirunelveli, the landlady demanded the premises from the tenant even though there are tutorial colleges at Shencottah. Since the husband is employed as teacher at Shencottah, there was compelling necessity for the landlady to reside at Shencottah and not at Tirunelveli. It is this compelling circumstance that has weighed in both the Courts below to come to a conclusion that the requirement of the landlady, for own occupation is not a *bona fide* one.

11. In *Komalam Ammal* v. *Ashoka Cycle and Motor Company*[1], it has been held by the Madras High Court that though the tenant had not paid the rents for 33 months, the inaction on the part of the landlady's husband, who was a lawyer and who was residing at the upstairs portion of the building to send any notice of demand, suggested that the plea of the tenant that he had been told by the landlady that she should receive the rent in lumpsum was quite probable and that the very conduct of the tenant in having remitted the entire rents for 33 months on receipt of the notice from the landlady probablised the fact that there was no wilful default on the part of the tenant in the payment of arrears of rent.

12. In *Basappa* v. *Jumnadoss*[2], it has been held by the Madras High Court that the default as a ground for eviction should be such that it should be so conspicuous to a reasonable person, that the tenant's attitude was nothing but supine indifference and the purposeful evasiveness resulting in recalcitrance and

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1. (1980) 1 M.L.J. 194.
2. (1979) 1 M.L.J. 217.

that the circumstance in a particular case, where the landlord was receiving rents in lumpsum without demur, can certainly be a ground for the tenant to set up a case that there was no wilful default or contumacious conduct on his part to avoid payment of rent".

13. In this case also, it cannot be said that the tenant has commited any wilful default as the landlady had led the tenant believe that he might remit the rents in lumpsum and had been receiving the rent in lumpsum from about 1955, till the notice was sent for the first time in 1976.

14. The decisions relied on by the counsel reported in *Nagalinga Josier* v. *The Trust*[1], and *Anandayee Ammal* v. *S. M. Khaja and Company*[2], related to particular circumstances in the cases that arose for consideration and the facts and circumstances that have arisen in this case are completely different.

15. So far as the requirement for own use is concerned, it is true that there is a decision of this Court that in case a landlord or landlady required the premises for own occupation, the question of *bona fides* is alien for consideration unless there are compelling circumstances to disbelieve the version of the landlord or the landlady. We have already observed that there are compelling circumstances, which have been correctly considered by both the Courts below on the basis of the evidence before them and their conclusion cannot be considered as perverse or baseless. Therefore, on both the grounds the revision petitioner is not entitled to succeed.

16. In the result, therefore, the civil revision petition is dismissed, but in the circumstances without costs. The order of the lower Courts are confirmed.

R.S. ——— *Petition dismissed.*

1. (1972) 2 M.L.J. 623: 85 L.W. 738.
2. (1967) 1 M.L.J. 368: 80 L.W. 225.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

K. C. Maran and another .. *Petitioners**

v.

M. Jayaramsian and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 68-F (1-D) together with the proviso—Scope and applicability.

A permit to ply buses on an inter-State route, Bangalore to Dharmapuri, a portion of which lay in the State of Tamil Nadu, a route not covered by any reciprocal agreement between the concerned States, was unilaterally granted by the Karnataka Authority. The holder of the permit applied to the Authority in Tamil Nadu for grant of counter-signature of his permit. The order of the State Transport Authority refusing the counter-signature was set aside by the State Transport Appellate Tribunal, Madras. On revision to the High Court it was contended that since a scheme for nationalisation published by the State Transport undertaking in Tamil Nadu covered the route from Salem to Bangalore, the route in question namely Dharmapuri to Bangalore being a part of it would also be covered by the scheme of the Transport Authorities and in view of certain directions of the Supreme Court in S.L.P. No. 941 of 1978 the Transport Authorities would have no jurisdiction to grant the counter-signature.

Held, disjunctive clauses are found mentioned as "(1) area; (2) route; and (3) portion thereof" in section 68-F (1-D) of the Motor Vehicles Act. Therefore each of the clauses will have to be given effect to. To say that the mentioning of a route would take within it even a portion of the route, because the word used in the body of the section is "covered" does not seem to be correct legal approach. "Covered" in the ordinary sense may mean "include" but the language used in the proviso "any area, route

*C.R.P. Nos. 3743 and 3536 of 1981.
14th December, 1981.

or portion thereof specified in a scheme" is in contrast with the language used in the main section. So long as the route in question is not mentioned definitely there is no scope for holding that even though the scheme is from point to point it will take within it the intermediary route as well. [*Para.* 4.]

If the route is between one terminus and another, so long as the two termini are not mentioned specifically in the scheme, the intermediary routes will stand totally unaffected. Besides one must have a look at the scheme promulgated under rule 294-C of the Tamil Nadu Motor Vehicles Rules. [*Para.* 5.]

Unless and until the route is expressly named or definitely mentioned, there is no scope for holding that even point to point scheme would exclude the intermediate operators. [*Para.* 5.]

Cases referred to:—

Damodar Das v. *Regional Transport Authority,* A.I.R. 1977 M.P. 46; *Mohammed Ashfaq* v. *State Transport Appellate Tribunal, U.P.,* (1976) 4 S.C.C. 330: (1977) 1 S. C. R. 563: A.I.R. 1976 S.C. 2161.

Petition under section 64-B of the Motor Vehicles Act and section 115, Civil Procedure Code, praying the High Court to revise the Order of the State Transport Appellate Tribunal, Madras, dated 14th September, 1981 and made in Appeal No. 664 of 1980 (R. No. 105091|4|79, State Transport Authority, Madras).

S. R. L. Narayanan, the Advocate-General for *R. Balasubramanian, C. Selvaraju* and *M. Palani,* for Petitioners.

V. Subramaniyam, for Respondents.

The Court made the following

ORDER.—Both these revisions raise an important question of law as to the meaning of section 68-F (1-D) together with its proviso of the Motor Vehicles Act. The respondent who is common in both these revisions namely Jayaramiah, the second respondent in C.R.P. No. 3536 of 1981 and the first respondent in C.R.P. No. 3743 of 1981, applied for the grant of the counter-signature of his permit on the inter-state route Bangalore to Dharmapuri *viz.,* Bonnergatta, Jigani, Anekal, Poonapalli, Border, Mathigore, Kolamangalam, Royakottah and Palacode in respect of the stage carriage MYA 4060. A portion of this route lies within the territory of Tamil Nadu State. The route is not covered by any reciprocal agreement and the primary permit was unilaterally granted by the Karnataka Authority. The State Transport Authority held that as much as 93 kms. of the route which is well over two-third of the total distance lies in the State of Tamil Nadu and, further, in view of the fact that there are a large number of direct bus services between Dharmapuri and Bangalore refused the counter-signature. On appeal by the respondent, Jayaramiah, two points were raised: (1) Whether counter-signature could be made as portions of the route overlap a certain scheme for nationalisation between Bangalore and certain points in Tamil Nadu published by the State Transport Undertakings in Tamil Nadu; and (2) Whether on facts there was any justification or necessity for the grant of the counter-signature? The Tribunal was of the view that the scheme related to point to point namely Salem to Bangalore (terminus to terminus) and therefore the route in question Bangalore to Dharmapuri could not be affected unless specified in the scheme. There is no specification. On the necessity, it held that occupancy ratio ranged between 68 per cent. and 86 per cent. There were also a number of public representations. On these two grounds, it directed the counter-signature. To revise his order, Anna Transport Corporation, one of the objectors has preferred C.R.P. No. 3536 of 1981 while another objector K. C. Maran has preferred C.R.P. No. 3743 of 1981. These two revisions since they relate to one and the same subject-matter are dealt with under a common order.

2. The learned Advocate-General, appearing for the Anna Transport Corporation, confines his entire arguments to only the question of law as to the scope and the applicability of the scheme for nationalisation. It is the contention that in so far as the scheme for nationalisation covers the route Salem to Bangalore, the route in question namely Dharmapuri to Bangalore being a part of the route would be covered by the scheme. Therefore in view of the directions of the Supreme Court in S.L.P. No. 941 of 1978,

the Transport Authorities, would have no jurisdiction to grant the counter-signature but merely will have to keep the application pending. This would be the position even though the route in question is not specifically mentioned. In support of this submission, reliance is placed in *Damodar Das* v. *Regional Transport Authority, Rewa*[1]. Under identical circumstances a Full Bench of the Madhya Pradesh High Court took the view that because section 78-F (1-D) uses the language "area or portion thereof covered by such scheme" any portion lying between point to point, namely Salem to Bangalore in the instant case, would be covered. That being so, there will be hardly any scope for the grant of counter-signature. The learned counsel for the petitioner in C.R.P. No. 3743 of 1981 adopts the arguments of the learned Advocate-General.

3. In opposition to this, the learned counsel for the respondent submits that there is a great difference between the language used in section 68-F ((1-D) and its proviso. While the main section says "covered by such scheme", the proviso would say "specified in the scheme". Besides in column 4 of the scheme there is no scope for complete or partial exclusion. If the interpretation placed is considered, the order of the Tribunal is correct notwithstanding the ruling of the Madhya Pradesh High Court.

4. I have given my careful consideration to the above arguments. Section 68-F (I-D) reads as under:

"Save as otherwise provided in sub-section (1-A) or sub-section (1-C), no permit shall be granted or renewed during the period intervening between the date of publication, under section 68-C of any scheme and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service in relation to any area or route or portion thereof covered by such scheme:

Provided that where the period of operation of a permit in relation to any area, route or portion thereof specified in a scheme published under section 68-C expires after such publication, such permit may be renewed for a limited period, but the permit so renewed shall cease to be effective on the publication of the scheme under sub-section (3) of section 68-D".

One thing that is very clear is, that disjunctive clauses are found mentioned as "(1) area; (2) route; and (3) portion thereof". Therefore each of the clauses will have to be given effect to. To say the mentioning of the route would take within it even portion of the route, because the word used in the body of the section is "covered", does not seem to be the correct legal approach. "Covered" in the ordinary sense may mean include but the language used in the proviso "any area, route or portion thereof specified in a scheme" is in contrast with the language used in the main section. Webster's Dictionary states the meaning of "specify" as follows:—

"name expressly, mention definitely". Therefore some differentiation will have to be made. It is in this regard, with great respect, I am unable to share the view of the Full Bench of the Madhya Pradesh High Court when it says as under:

"This inference as to the meaning of a route "covered" by a scheme is further strengthened by a look at section 68-D which uses the words "covered by such scheme" or "covered by the scheme" at three places in sub-section (8). The section contemplates publication of a scheme in the Official Gazette and a newspaper circulating "in the area or route which is proposed to be covered by such scheme". The section further provides that any person providing transport facilities by any means along or near "the area or route proposed to be covered by the scheme", any recognised association and any local authority or police authority within whose jurisdiction "any part of the area or route proposed to be covered by the scheme lies" can file objections to the scheme. The words "covered by such scheme" and "covered by the scheme" "occurring in section 68-D (1) do not obviously have any link with the exclusion or non-exclusion of private operators by the scheme. These words here, as in section 68-C, refer to the area or route specificed in the scheme in

1. A.I.R. 1977 M.P. 46.

respect of which the State Transport Undertaking proposes to provide transport services. Reading sub-section (1-D) of section 68-F in the light of sections 68-C and 68-D, it is clear that the words "covered by such scheme" in sub-section (1-D) are used in the same sense in which these words or similar words are used in sections 68-C and 68-D (1). A route would be held to be "covered" by a scheme within the meaning of sub-section (1-D) if it is specified in the scheme which proposes that the State Transport Undertaking will run its services on it irrespective of any provision for exclusion or non-exclusion of private operators. This conclusion is further supported by reading together the enacting part of sub-section (1-D), its proviso and sub-sections (1-A) and (1-C) of section 68-F. These sub-sections of section 68-F are closely linked and they provide as to what is to happen during the period between the date of publication of a scheme under section 68-C and the date of publication of the approved scheme under section 68-D (3). Sub-section (1-D) enacts a prohibition and provides that during this period no permit can be granted or renewed in relation to "an area or route portion thereof covered" by the scheme. The ban in the matter of renewal is lifted by the proviso in a case where the period of operation of a permit "in relation to any area or route or portion thereof specified in the scheme" expires after the publication of the scheme under section 68-C. Similarly, sub-sections (1-A) and (1-C) lift the ban as regards temporary permits and make provision for grant of temporary permits to the State Transport Undertaking and failing that to any other person "in respect of the area or route or portion thereof specified in the scheme". It will be seen that though the enacting part of such-section (1-D) uses the words "covered by such scheme", the proviso uses the words "specified in the scheme" which are also used in sub-sections (1-A) and (1-C). As all these provisions are closely connected and operate in the same field, it is clear that the words "covered by such scheme" in sub-section (1-D) mean the same thing as "specified in the scheme" used in the proviso and sub-sections (1-A) and (1-C)".

In coming to this conclusion, the Full Bench chose to rely upon a ruling of Bhagwati, J., in *Mohammed Ashfaq* v. *State Transport Appellate Tribunal, U.P.*[1]. The extract itself clearly refers to *specified* in the scheme. As already noted according to Webster's Dictionary the meaning of the word "specify" is "name expressly, mention definitely". Therefore, so long as the route in question is not named expressly or mentioned definitely, there is absolutely no scope for holding that even though the scheme is from point to point it will take within it the intermediary route as well.

5. There is yet another way of looking at the matter. Section 2 (28-A) defines "route" as follows:—

> " 'route' means a line of travel which specifies the highway which may be traversed by a motor vehicle between one terminus and another".

If therefore the route is between one terminus and another, so long as the two *termini* are not mentioned specifically in the scheme, the intermediary routes will stand totally unaffected. Besides one must have a look at the scheme promulgated under rule 294-C of the Tamil Nadu Motor Vehicles Rules. In the instant case, clauses 4 and 5 are to the following effect:

> "The stage carriages on the entire route *Salem* to *Bangalore* (*terminus* to *terminus*) and on the entire sector between *Salem* and *Gummalapuram* (*terminus* to *terminus*) in the above route should be run and operated exclusively by the State Transport Undertakings of this State to the complete exclusion of all other persons in respect of permits covering the entire route and the entire sector."

Therefore, how is it possible for any one to conclude whether the exclusion is complete or partial, if the interpretation placed by the learned Advocate-General is accepted. What I mean by this, is, if by mentioning Salem to Bangalore, terminus to terminus, all the other intermediate operators stand excluded altogether or, in an absolute fashion, there is no

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1. (1976) 4 S.C.C. 330: (1977) 1 S.C.R. 563: A.I.R. 1976 S.C. 2161 at 2166.

possibility of complete exclusion or partial exclusion, because they have already been excluded. Then where is the question of partial exclusion? When the Full Bench of the Madhya Pradesh High Court goes to the extent of saying even area will stand excluded, I am afraid it would amount to reading too much into the section which is not warranted. The Parliament in its wisdom has chosen to employ words like "covered" in the body of the section and "specified" in the proviso. More than this, if the interpretation placed by the learned Advocate-General is accepted, the disjunctive clauses are rendered nugatory Besides "any portion thereof" occurring both in the body of the section and in the proviso will be rendered otiose. Therefore, I should hold unless and until the route is expressly named or definitely mentioned, there is no scope for holding that even point to point scheme would exclude the intermediate operators. Once I come to the conclusion that the scheme does not apply, there is no scope for applying the ruling of the Supreme Court rendered in S.L.P. No. 941 of 1978. Therefore, I uphold the grant of countersignature. The civil revision petition will stand dismissed. But there will be no orders as to costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. Fakkir Mohammed, J.*

Mohammed Saleha .. *Petitioner**

v.

Syed Nooruddin .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 26—Impleading of sub-tenants, whether necessary.

Under section 26 of Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), the landlord is expected to implead the sub-tenant also as a party in order to avoid any allegation of collusion between the landlord and the main tenant. If there was a sub-tenant with the written consent of the landlord and a collusive eviction petition was filed by the landlord and eviction order is passed in the absence of the sub-tenant, it will cause undue hardship and injustice. In order to obviate such collusive proceedings only, such safeguard has been added in the amendment Act. In this case the omission to implead the sub-tenant shows the *mala fides* of the landlord. [*Para.* 8.]

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973) praying the High Court to revise the Order of the Court of the Small Causes (VI Judge) (Appellate Authority), Madras, dated 23rd June, 1979 and made in H.R.A. No. 1470 of 1979 (H.R.C. No. 2120 of 1978) (X Judge, Court of Small Causes, Madras).

V. N. Srinivasa Rao and *Mohammed Bazlullah,* for Petitioner.

Mohammed Kaleemullah, for Respondent.

The Court delivered the following

JUDGMENT.—The revision petition has been filed by the respondent in H.R.A. No. 1470 of 1979, who is the landlord against the order, dated 22nd August, 1980, setting aside the order of eviction passed in H.R.C. No. 2120 of

*C.R.P. No. 1872 of 1981.
22nd December, 1981.

1978 by the then X Court of Small Causes, Madras, dated 23rd June, 1979.

2. The landlord filed an eviction petition under sections 10 (2) (*ii*) (*a*) and 10 (2) (*iii*) of the Tamil Nadu Act XVIII of 1960 alleging that the tenant has without the written consent and knowledge of the landlord and contrary to the terms of the lease demised the premises to a sub-tenant on a monthly rent of Rs. 125, even though the letting in favour of the respondent-main-tenant was on a monthly rent of Rs. 100 and for having effected unauthorised construction and additions without the knowledge and consent of the landlord. In H.R.C. No. 2120 of 1978, the alleged sub-tenant has not been impleaded by the landlord. The Rent Controller rejected the ground of acts of waste and ordered eviction on the ground of sub-letting and granted 3 months to vacate the premises. Thereupon, the tenant filed an appeal against the order of eviction of the Rent Controller. The appellate authority has found that the alleged sub-tenant is only the brother of the appellant and there was no sub-letting at all and, accordingly allowed the appeal and set aside the order of eviction passed by the Rent Controller.

3. Exhibit P-3 is the copy of the lawyer's notice, dated 4th July, 1978 sent by the landlord to the respondent-tenant, who is named Syed Nooruddin. In Exhibit P-3 it is alleged that the tenant had sublet a portion of the building on a monthly rent of Rs. 125 to one Syed Ahmed, that he has also erected construction and hence the tetnant should vacate the building. Exhibit P-4 is the reply notice sent through lawyer, dated 17th July, 1978 by the tenant stating that the landlord had sent similar lawyer's notice some years before also making similar allegation, that the tenant had sent a suitable reply meeting all the allegations, that the allegation of sub-lease of a portion of the building at Rs. 125 is false and that the tenant himself and his brother alone are residing in the premises. Thereafter only the eviction petition has been filed by the landlord making similar allegations as made in the lawyer notice, dated 4th July, 1978.

4. In Exhibit P-3 copy of the lawyer notice there is no reference to any notice received from the Corporation by the landlord, namely, Exhibit P-2. Exhibit P-2 is said to be a special notice said to have been served on the landlord on 31st March, 1978, wherein it is stated that the annual value of the building will be revised for the 1st half year, 1978-79 as Rs. 1,365. In paragraph 4 of the petition, there is no reference made to the Corporation Notice, namely, Exhibit P-2, though the sub-lease of a portion of the building to one Syed Ahmed on a monthly rent of Rs. 125 has been mentioned. In paragraph 7 of the petition reference is made to the lawyer's notice, dated 4th July, 1978 sent by the landlord to the respondent herein. The landlord had not sent any rejoinder to the reply notice sent by the tenant under Exhibit P-3 nor has the landlord made any reference in the eviction petition to the specific allegation made by the tenant in Exhibit P-4, that the landlord had sent a similar lawyer notice through the very same lawyer of the landlord some years before, making the same allegation and that the landlord did not proceed further on the previous lawyer's notice. It was in Exhibit P-4, the tenant had pleaded that he has been residing along with his brother only. There is no averment in the eviction petition that Syed Ahmed, the alleged sub-tenant is not the brother of the tenant.

5. In order to substantiate the contention of sub-lease the landlord has produced Exhibit P-5 series, demand notices and Exhibit P-6 series. Exhibits P-5 and P-6 series reveal that the Corporation had increased the annual rental value wihout stating that the rent fetched by the building is Rs. 125 per month. The learned appellate authority has observed in paragraph 7 of the order that a perusal of Exhibit P-5 and Exhibit P-6 series showed that there is nothing to show that the premises was sublet by the tenant to Syed Ahmed. The above conclusion of the appellate authority is not attacked. In the same paragraph, the appellate authority has observed—that in Exhibit P-4 the tenant had clearly stated that himself and his brother alone are residing in the premises and that there is nothing to show that the appellant therein had sublet the premises on a monthly rent of Rs. 125. In the later portion of the said paragraph the appellate authority has observed that R.W. 1, namely, tenant has deposed that Syed Ahmed is his brother, that in Exhibit R-1,

the name of Syed Ahmed is found and that Exhibit R-2, dated 6th July, 1967 also showed the name of Syed Ahmed and that therefore there was no subletting by the tenant.

6. Exhibit R-1 is the copy of the Electoral Roll for the year 1976. In Exhibit R-1, the occupants of Door No.52|1, in Pachaiappa Chetty Street are mentioned as Syed Assisuddin, son of *Syed Hussain,* Noorulla Hussain, son of *Syed Hussain,* Asmathbi, wife of Syed Assisuddin, Mallikabi, wife of Noorulla Hussain, *Basal Hussain,* son of *Syed Hussain,* Syed Munavar Hussain, son of *Syed Hussain* and *Syed Ahamadulla Hussain,* son of *Syed Hussain.* In the schedule to the petition, the building has been described as Old Door No. 52|1 and New Door No. 61, Pachaiappa Chetty Street, Mount Road, Madras-2. The tenant is described in paragraph 2 of the petition as *son of late Syed Hussain Sahib,* residing at No. 61 (Old No. 52|1), Pachaiappa Chetty Street. Thus, Exhibit R-1 goes to prove that the tenant has been residing in the schedule building along with his mother, brothers and his wife at least from 1976 and prior to that and Syed Ahamadullah Hussain is his brother. The evidence of R.W. 1 is that Syed Ahmadullah Hussain was used to be called as Syed Ahmed. There is nothing strange in the evidence of R.W. 1 to say that his brother Ahmadullah Hussain is called as Syed Ahmed. In all houses, the members of the family used to call by short names, wherever their names are lengthy. Exhibit R-2 is also relied upon by the tenant and it is a conduct certificate by a Member of Parliament, Thiru C. Chittibabu to the effect that Syed Ahmadullah Hussain, son of Syed Hussain Saheb residing at No. 52|1, Pachaiyappa Chetty Street, Mount Road, Madras bears good conduct and character and deserves encouragement. The certificate was granted on 6th July, 1967. According to the evidence of R.W. 1, his brother Syed Ahamadullah Hussain, who is called as Syed Ahmed got Exhibit R-2 conduct certificate. The appellate authority has relied upon Exhibit R-2 also and observed that it goes to prove that Syed Ahmed is the brother of the tenant. Under section 25 of the Tamil Nadu Act (XVIII of 1960), the High Court is not expected to interfere with the decision of the lower Court on a question of fact, unless the decision of the lower Court is perverse.

7. The only argument of the learned counsel for the revision petitioner is that the brother of the tenant could have been examined by the tenant to prove that he is not a sub-tenant. In Exhibit P-4 reply notice, the tenant has already pleaded that the landlord had sent a previous lawyer notice making same allegations to say that the tenant had sublet to one Syed Ahmed some years, before, that he had refuted the said allegation by sending reply notice and that Syed Ahmed is none else than his brother. The landlord has not let in any evidence to prove that Syed Ahmed is a sub-tenant and not the brother of the main tenant, whereas the tenant has adduced satisfactory evidence to show that Syed Ahmed, whose real name is Syed Ahamadullah Hussain, is the son of Syed Hussain, just like the tenant Syed Nooruddin, who is also the son of Syed Hussain residing at old No. 52|1 Pachiappa Chetty Street. There is absolutely no merit whatsoever in the revision petition and it has to be dismissed with costs.

8. Under section 26 of Act (XVIII of 1960), the landlord is expected to implead the sub-tenant also as a party in order to avoid any collusion between the landlord and the main tenant. If there was a sub-tenant with the written consent of the landlord and a collusive eviction petition was filed by the landlord and an eviction order is passed in the absence of the sub-tenant, it will cause undue hardship and injustice. In order to obviate such collusive proceedings only, such safeguard has been added in the amended Act. Because Syed Ahmed is the brother of the respondent herein to the knowledge of the landlord, the latter has not impleaded Syed Ahmed also as a party as it will throw much light on the knowledge of the landlord that Syed Ahmed is also the son of Syed Hussain, the father of the tenant. The omission to implead Syed Ahmed shows the *mala fides* of the landlord. Therefore, also the eviction petition stands to be dismissed.

9. In the result, therefore, the revision petition is dismissed with costs and the order of the appellate authority is confirmed.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

S. K. Munuswami Mudaliar .. *Petitioner**

v.

The Authorised Officer (Land Reforms), Kancheepuram .. *Respondent.*

(A) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) (Amendment) Act (VII of* 1970), *section* 73 (8)—*Exemption of land —Scope and applicability.*

(B) *Tamil Nadu Land Reforms (Fixation of Ceiling on Land) (Amendment) Act (VII of* 1970), *sections* 20 *and* 23—*Applicability.*

The petitioner-landowner held 16.28 standard acres of land as on 15th February, 1970. Exemption having been granted in respect of 0.92 standard acre under section 73 (*a*) of the Land Reforms Act (1970), the balance was within the ceiling limit. The exemption condition being found to have been violated, the Authority determined the surplus land at 1.26 standard acres and required the petitioner to surrender such surplus. In the meanwhile on 9th May, 1972, the petitioner had settled 5.26 standard acres of land in favour of his married daughter. The petitioner claimed that he had less than 15 standard acres with him and there was no surplus. The contention was rejected and the Court of the Land Ceiling Tribunal confirmed the order. On revision to the High Court,

Held: Section 23 of the Tamil Nadu Land Reforms Act (1970) is subject to section 20 of the Act, under which, if, as a result of any transfer of land either by sale, gift, exchange, surrender, agreement, settlement or otherwise effected on or before the notified date the extent of land held by the transferee exceeds the ceiling area, than the right, title or interest accrued in his favour by virtue of such transfer of land in excess of the ceiling area shall, as a penalty for contravention of the provisions of section 7 of the Act be deemed to have been transferred to the Government with effect from the date of such transfer, on a declaration made by the Authorised Officer within whose jurisdiction such excess land or the major part thereof is situated. This provision was intended to strike against the avoidance of the provisions of the Act by subsequent transfers effected after the notified date. In such a case the transferee or the settlee will lose the excess land on the declaration made by the Authorised Officer. The present was not such a case and if this provision *viz.*, section 20 of the Act had to be applied, it would have to be applied only against the settlees.

[*Para.* 4.]

Section 23 of the Act applied only for the purpose of fixing the ceiling for the first time. It avoids the transactions entered into between the notified date and before the publication of notification. The notified date is 15th February, 1970, and the publication of the notification under section 18 (1) is 2nd October, 1970. It is the intervening transactions that are sought to be affected by section 23 of the Act. In the instant case the transaction is not a transaction of that kind. It falls outside the relevant period 15th February, 1970 and 2nd October, 1970. Section 23 of the Act was, therefore, not relevant for the present purpose. The intendment of the Act is only to see that the holdings of any owner are not in excess of the ceiling contemplated by it. If in the present case, the petitioner was holding his entire 16.28 acres intact and had converted the land, which was used exclusively for growing trees, for purposes of cultivation, then he would not be eligible for the exemption and the excess land will have to be taken over. But section 73 (8) of the Act does not apply to a case like this where the holding of the owner is less than the ceiling fixed under the Act. In such a case the owner will be free to convert the exempted area to any use to which he can profitably put. [*Para.* 5.]

Petition under section 83 of Madras Act (LVIII of 1961), praying the High Court to revise the Order of the Court of the Land Ceiling Tribunal (Principal Subordinate Judge), Chingleput, dated 31st December, 1980 and made in C.M.A. No. 199 of 1978

*C.R.P. No. 2119 of 1981.
22nd December, 1981.

(M|43|PNI|MRI|70-D, Authorised Officer, Land Reforms, Kancheepuram).

T. Rangaswami Iyengar, for Petitioner.

G. Jeremiah, for Additional Government Pleader, for Respondent.

The Court made the following

ORDER.—The land owner is the petitioner in this revision. The petition has been filed to revise the order of the Land Ceiling Tribunal (Principal Subordinate Judge), Chingleput, passed in C.M.A. No. 199 of 1978. The petitioner held 35.46 ordinary acres equivalent to 16.28 standard acres as on 15th February, 1970. Out of this holding, an extent of 2.78 ordinary acres equivalent to 0.92 standard acre in S. No. 81|2 in Amirthamangalam village was exempted under section 73 (8) of the Tamil Nadu Land Reforms Act, 1970, hereinafter referred to as the Act. Section 73 (8) of the Act provides for exemption where any land is used exclusively for growing fual trees on the date of the commencement of the Act. After taking into account the exemption, the petitioner's holding was 15.33 standard acres and since the surplus was within the ceiling limit, further action was dropped by the authorities.

2. It was subsequently found on inspection that on the exempted extent of 2.78 ordinary acres paddy crop was raised in faslis 1385 and 1386. Under the proviso to section 73 (8) of the Act, the land with reference to which exemption was granted, would enjoy the exemption only so long as the land was used for such purposes. As the condition of exemption was violated, by raising paddy crop, the Authorised Officer (Land Reforms), Kancheepuram, passed an order determining the surplus land to be 1.26 standard acres and requiring the petitioner to surrender this 1.26 standard acres within a week from the date of receipt of the order. The petitioner filed an appeal to the Land Ceiling Tribunal, which confirmed the order of the Authorised Officer. Hence, the revision.

3. In this revision, it is contended, that on 9th May, 1972, the petitioner had settled 5.22 standard acres equivalent to 14.67 ordinary acres in favour of his married daughter, and therefore after this settlement, he would be holding only less than the ceiling limit and that therefore, there was no question of the exemption being withdrawn. On behalf of the Government, it was contended that so long as the condition under section 73 (8) of the Act was not satisfied, the land would be surplus land. It was, therefore, argued that the orders of the Authorised Officer and the Land Tribunal should be confirmed.

4. Section 23 of the Act so far as it is relevant, provides thus:

"Subject to the provisions of section 20, for the purpose of fixing, for the first time, after the date of the commencement of this Act, the ceiling area of any person holding land on the date of the commencement of this Act in excess of 15 standard acres—

(*a*) any transfer, whether by sale or by gift, exchange, surrender, settlement or otherwise; or

(*b*) * * * *

effected on or after the notified date and before the publication of a notification under sub-section (1) of section 18, shall be, and shall be deemed always to have been, void and accordingly the authorised officer shall calculate the ceiling area of such person as if no such transfer.......... had taken place".

This provision is subject to section 20 of the Act, under which, if, as a result of any transfer of land either by sale, gift, exchange, surrender, agreement, settlement or otherwise effected on or after the notified date the extent of land held by the transferee exceeds the ceiling area, then the right, title or interest accrued in his favour by virtue of such transfer of land in excess of the ceiling area shall, as a penalty for contravention of the provisions of section 7 of the Act be deemed to have been transferred to the Government with effect from the date of such transfer, on a declaration made by the authorised officer within whose jurisdiction such excess land or the major part thereof is situated. This provision was intended to strike against the avoidance of the provisions of the Act by subsequent transactions effected after the notified date. In such a case, the transferee or the settlee will lose the excess land on the

declaration made by the Authorised Officer. This is not such a case and if this provision *viz.*, section 20 of the Act had to be applied, it would have to be applied only in the case of the settlees.

5. Coming back to section 23 of the Act, it would be clear that it applies only for the purpose of fixing the ceiling for the first time. It avoids the transactions entered into between the notified date and before the publication of the notification. The notified date is 15th February, 1970, and the publication of the notification under section 18 (1) is 2nd October, 1970. It is the intervening transactions that are sought to be affected by section 23 of the Act. The present is not a transaction of that kind. It falls outside the period 15th February, 1970 and 2nd October, 1970. Section 23 of the Act was, therefore, not relevant for our present purpose. The intendment of the Act is only to see that the holdings of any person are not in excess of the ceiling contemplated by it . If in the present case, the petitioner was holding the entire 16.28 acres intact and had converted the land, which was used exclusively for growing trees, for purposes of cultivation, then he would not be eligible for the exemption and the excess land will have to be taken over. But section 73 (8) of the Act does not apply to a case like this where the holding of the owner is less than the ceiling fixed under the Act. In such a case, the owner will be free to convert the exempted area to any use to which he can profitably put.

6. The result is, the order of the Authorised Officer and that of the Land Tribunal are not legal and proper. The civil revision petition is accordingly allowed. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

Karuppana Thevar .. *Petitioner**

v.

S. R. Karuppiah Thevar and another .. *Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980), *section* 3 (e)—*"Family"—Definition—Money decree sought to be executed against two brothers—Debtors claiming benefit under the Act—Allegation of total income of both the brothers being Rs.* 10,000—*Village karnam confirming income from lands to be Rs.* 7,000 —*Decree amount, whether discharged by reason of the provisions of the Act.*

In the present case the judgment-debtors who were two brothers claimed in the course of execution proceedings against them the benefits of Madras Act XIII of 1980. It was found that their father had died leaving three sons, three daughters and his widow. It was also found that the income from the lands would be Rs. 7,000 and that other income was Rs. 3,000.

Held: The two brothers (judgment-debtors) cannot be taken as members of the 'family' in the light of the definition in section 3 (*e*) of that term. With reference to each of the individuals, the earnings of the family will have to be considered. So considered the finding that the income of each of the brothers would be Rs. 3,800 was not wrong. The statute discharges the debt in such cases and the execution petition could not be sustained. [*Para.* 5.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Tirumangalam, dated 4th September, 1981 and made in E.P. No. 622 of 1979 in O.S. No. 250 of 1978.

P. Pandi, for Petitioner.

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*C.R.P. No. 3488 of 1981.
18*th December*, 1981.

The Court made the following

ORDER.—The petitioner is the decree-holder. He filed an execution petition for realisation of the amount due under the decree in A.S. No. 250 of 1978. The decree was as against two persons, who are brothers. In the course of the execution proceedings, they claimed that they were entitled to the benefit of the Tamil Nadu Act, XIII of 1980.

2. The petitioner contended before the Court below that the two brothers were having 1.53 acres of nanja lands with irrigation facilities from a tank and also from a well on the land itself. The income from the land was, stated to be Rs. 7,000. They were also said to be otherwise earning a sum of Rs. 3,000. Thus the total income of both the brothers was stated to be Rs. 10,000. The Karnam of the village was examined for the purpose of showing that the family had a substantial income from the land. He confirmed that the income from the land was Rs. 7,000.

3. The Court below, after considering the evidence came to the conclusion that the income of each of the brothers would be Rs. 3,800 as against the limit of Rs. 4,800 prescribed for a debtor to get benefit under the Act XIII of 1980. The decree amount was thus held to be statutorily discharged. The present revision petition has been filed against the said order.

4. The learned counsel for the petitioner contended that the two brothers constituted a family and that the income from the entire property should have to be taken and not merely on the basis of a notional partition between the brothers. The father died in 1974 leaving 3 sons, 3 daughters and his widow. On the death of the father, all of them were entitled to inherit the share of the father. As far as the brothers are concerned, they would be entitled to 1|3rd share in the property.. The word 'family' has been defined in section 3 (*e*) of the Tamil Nadu Debt Relief Act XIII of 1980, as follows:—

> "Family in relation to a person means the individual, the wife or husband, as the case may be of such individual and their unmarried minor children".

There is an *Explanation* to section 3 (*e*), which is not material.

5. In the present case, the two brothers cannot be taken as members of the family in the light of the definition given above. With reference to each of the individuals, the earnings of the family will have to be considered. Considered in this light, the finding that the income of each of the brothers would be Rs. 3,800 cannot be said to be wrong. As the statute discharged the debt in such cases, the execution petition was rightly dismissed.

6. The civil revision petition is, therefore, dismissed.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Swamikkannu, J.*

K. R. Venkatrama Gounder and others .. *Petitioners**

v.

Rangathai .. *Respondent.*

(A) *Partition Act (IV of* 1893), *section* 2—*Sale of property—Lower Court passing order for sale of two items without applying its mind on the suggestion of the Advocate—Commissioner who inspected the properties—Whether the order directing sale is revisable under section* 115 *of Civil Procedure Code.*

(B) *Civil Procedure Code (V of* 1908), *section* 115.

Held: Section 2 of the Partition Act, contemplates application of the mind of the Court to which an application is made for sale of the properties. Two properties had been directed to be sold by virtue of the concerned order. There is absolutely no indication to show that the lower Court had applied its mind, whether the sale of one of the two items of properties alone could satisfy the claim of the petitioner. Under these circumstances the order under revision becomes revisable. [*Para.* 5.]

Cases referred to:—

Ramaprasada Rao v. *Subbaramaiah,* (1957) 2 An.W.R. 488: A.I.R. 1958 A.P. 647; *Muthusami Gounder* v. *Kaithamalai,* (1976) 2 M.L.J. 373.

*C.R.P. No. 3384 of 1980.
28*th January,* 1982.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Gobichettipalayam, dated 1st October, 1980 and made in I.A. No. 849 of 1977 in O.S. No. 801 of 1973.

V. Shyamalam, for Petitioners.

P. Pandi, for Respondent.

The Court made the following

ORDER.—It is common ground that two items of properties had been directed to be sold in public auction by the lower Court and that an objection has been taken at the very initial instance itself that both the houses should not be subjected to public sale, because the proceeds of the sale of one of the houses could itself satisfy the requirements of the claim. When such is the position, so far as this revision petition is concerned, it is submitted by Mr. Shyamalam, learned counsel for the revision petitioner, that section 2 of the Partition Act (IV of 1893), which is applicable to the facts of the case, clearly enumerates that the lower Court ought to have applied its mind regarding the distribution of the proceeds of the sale, maintaining its view regarding the beneficial aspect as far as the shareholders are concerned and in the instant case, the learned District Munsif, while ordering the petition under Order 26, rule 13 of the Code of Civil Procedure, has not adverted to this.

2. On the other hand, Mr. Pandi, learned counsel for the respondent in this revision refers to the decision reported in *Ramaprasada Rao* v. *Subbaramaiah*[1], and refers to the following observation:

"Under the Act, a right is conferred upon the sharer or sharers, if certain conditions are complied with, to request the Court to sell the property and a correlative right conferred upon a smaller sharer to insist upon purchasing the former's share or shares at a value fixed by the Court. Except to this extent and that provided by the other provisions of the Act, the power of the Court to partition the properties equitably by any of the methods detailed above or similar others is not, in any way, affected by the provisions of the Act".

He further refers and submits that inasmuch as the Court had applied its mind and directed the sale of the two houses in question, there is absolutely no ground for this Court to interfere with the order in question under the provisions of section 115 of the Code of Civil Procedure.

3. The point for consideration in this revision petition is:

"Whether the order in question pronounced by the learned District Munsif directing the sale of the two houses in question, is revisable or not under the provisions of section 115, Code of Civil Procedure?"

Section 2 of the Partition Act (IV of 1893), reads as follows:—

"Whenever any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of shareholders therein, or of any other special circumstances, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds".

Each case has to be decided on the facts of that particular case. In the instant case, it is in dispute that the direction has been given by the lower Court *viz.*, the Court of the District Munsif by way of order in I.A. No. 849 of 1977, dated 1st October, 1980, which runs as follows:—

"As the Commissioner has suggested who inspected the property to apply for Partition Act, the same Commissioner is directed to sell the B Schedule property in public auction after publication and deposit sale proceeds into Court and file a report. The Commissioner's fee of Rs. 100 and initial expenses of Rs. 75 are to be paid by the

1. (1957) 2 An.W.R. 488 at 495: A.I.R. 1958 A.P. 647.

petitioner direct. Report by 5th December, 1980".

It is relevant to note, it is the above order which is the subject-matter of this revision petition.

4. It is *inter alia* argued by Mr. Shyamalam, learned counsel for the revision petitioner that inasmuch as the sale proceeds of one of the two houses, which have been now directed to be sold by virtue of the above order under revision can satisfy his claim, the lower Court has not applied its mind as per the provisions of section 2 of the Partition Act.

5. On the other hand, Mr. Pandi, learned counsel for the respondent would rely only on the *ratio decidendi* of the decision reported in *Ramaprasada Rao* v. *Subbaramaiah*[1], and submits that the order under revision is not revisable under the provision of section 115, because, it is not having any of the infirmities contemplated by section 115 of the Code of Civil Procedure. It is relevant to note that the provision of section 2 of the Partition Act, contemplates application of the mind of the Court to which an application is made for sale of the properties.. It is needless to say that two properties had been directed to be sold by virtue of the above order. There is absolutely no indication to show that the lower Court had applied its mind, whether the sale of one of the two items of properties alone could satisfy the claim of the petitioner. Under these circumstances, the order under revision becomes revisable and is hereby revised. The lower Court is directed to consider this aspect of the question raised on behalf of the revision petitioner herein and restore the petition on its file and deal with it afresh, in accordance with law.

6. Mr. Shyamalam, learned counsel for the revision petitioner, also points out that as per the *ratio decidendi* imbedded in the decision reported in *Muthusami Gounder* v. *Kaithamalai*[2], unless there is a petitition for sale by the plaintiff, who is admittedly having only 1|12 share in the property, this question can also be gone into by the Court below. This aspect may also be borne in mind by the lower Court while disposing of the application.

1. (1957) 2 An.W.R. 488: A.I.R. 1958 A.P. 647.
2. (1976) 2 M.L.J. 373.

7. With the above direction, the civil revision petition is allowed and the matter is remanded to the lower Court for fresh disposal according to law and in the light of the observations contained in this judgment. The lower Court is also directed to dispose of this application within a month from the date of receipt of the records as this is a matter pending for a long time from the inception of the suit. Under the circumstances, there is no order as to costs.

R.B. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

R. Subbarajulu .. *Petitioner**

v.

Sulaiman, Proprietor of Naaz Dry Cleaners 18-19, East Chithrai Street, Madurai (died) and others .. *Respondents.*

and

R. Subbarajulu .. *Petitioner*

v.

Sulaiman (deceased) and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *(as amended by Act (XXIII of* 1973), *sections* 4 *and* 5—*Scope and applicability—Fixation of fair rent to building—Market value of site and cost of construction of the building to be taken into consideration.*

Held: Under sections 4 and 5 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973), it is obligatory on the part of the Rent Controller to take into consideration the market value of the site and the cost of the construction of the building for fixing the fair rent of a building. [*Para*. 15.]

In view of the mandatory provisions of section 4 of the Act, that in fixing the fair rent, the Rent Controller shall take into consideration the cost of the building, the Appellate Authority is not justified in acting on a memo.

*C.R.P. Nos. 2493 and 2494 of 1978 and C.M.P. Nos. 3354 and 3355 of 1979 and 478 of 1981 in C.R.P. No. 2493 of 1978.

18*th September,* 1981.

filed by the advocate for the landlord and excluding the cost of construction of the building and arriving at the fair rent taking into consideration the cost of the land alone.

[*Para.* 21.]

Since the Appellate Authority had not taken into consideration the data available in respect of the value of the site in the proper perspective and had not arrived at the proper value of the site on which the building is situate its order cannot be sustained.

[*Para.* 25.]

Cases referred to:—

Sourendra Nath Mitra v. *Tarubala Dasi,* (1930) 58 M.L.J. 551: 57 I.A. 133: 31 L.W. 803: A.I.R. 1930 P.C. 158; *Govindammal* v. *Marimuthu Maistry,* (1958) 2 M.L.J. 34: 70 L.W. 818: A.I.R. 1959 Mad. 7; *Smt. Jamilabi Abdul Kadar* v. *Shankarlal Gulabchand,* (1975) 2 S.C.W.R. 307; *Employers in relation to Manoharbahal Colliery* v. *K. S. Mishra,* (1975) 2 S.C.C. 244: A.I.R. 1975 S.C. 1632; *The Madras Co-operative Printing and Publishing Society Ltd.* v. *O. Ramalingam,* (1976) 1 M.L.J. 136; *S. Attendrooloo Chetty's Charities* v. *Sadhana Aushadalaya,* (1968) 2 M.L.J. 406; *R. Sivagnanam* v. *Everest Boarding and Lodging,* (1969) 1 M.L.J. 101.

C.R.P. Nos. 2493 *and* 2494 *of* 1978.

Petitions under section 25 of Act, XVIII of 1960, as amended by Act XXIII of 1973, praying the High Court to revise the order of the Court of the Principal Subordinate Judge (Appellate Authority), Madurai, dated 21st March, 1978 in C.M.A. Nos. 308 and 309 of 1977, respectively (R.C.O.P. Nos. 395 and 415 of 1974), respectively, D.M.C.—Additional Rent Controller—Madurai.

C.M.P. Nos. 3354 *and* 3355 *of* 1979.

Petitions presented: (1) to bring on record the respondents 2 to 5 herein as the legal representatives of the deceased 1st Respondent (C.M.P. No. 3354 of 1979); and (2) to appoint Hyrunissa Begum, the 2nd Respondent herein the mother as guardian of her minor children, respondents 3 to 5 herein (C.M.P. No. 3355 of 1979) in C.R.P. No. 2493 of 1978.

C.M.P. No. 478 *of* 1981.

Petition presented to implead ' Naaz Dry Cleaners and Launderers' a partnership firm, represented by Hajee Moosa Omar, as respondent in the C.R.P. No. 2493 of 1978.

M. N. Padmanabhan for *R. Sundaralingam* and *T. R. Mani,* for Petitioner.

P. Pandi, for Respondents.

The Court made the following

ORDER.—C.R.P. No. 2493 of 1978 is filed by the landlord against the order of the appellate authority in C.M.A. No. 308 of 1977 on the file of the Court of the appellate authority and the Principal Subordinate Judge of Madurai. Originally the landlord filed R.C.O.P. No. 415 of 1974 on the file of the Court of the Rent Controller and the District Munsif of Madurai for fixation of fair rent in respect of the premises bearing door No. 15-A|1, Westveli Street, Madurai, belonging to him. The case of the landlord before the Rent Controller is that the tenant who is described as Sulaiman, Proprietor of Naaz Dry Cleaners, took on lease the above said premises for non-residential purposes orally agreeing to pay a rent of Rs. 75, per month the tenancy month being the English Calendar month. It is also the case of the landlord that the building is situate in a very important locality and it is very near to the bus stand and the railway junction and the building is 18 years old. The building is in a very good condition with modern amenities. It is averred in the rent control application that the building was built with brick and cement, plastered with cement and the windows, doors, door frames and shutters are all made of teakwood and hence the building satisfies the requirement of class I building under the Tamil Nadu Buildings (Lease and Rent Control) Act. The building has got all modern amenities like internal water supply, sanitary and electrical installations. Having regard to the nature of the building, the Rent Controller ought to have allowed 30 per cent. of the cost of construction as per section 4 (5) (*a*). The depreciation can be allowed only at 0.5 per cent. per annum. It is also averred in the application that the cost of one square foot of the site in that vicinity is not less than Rs. 300. It is also the case of the landlord that calculating the said value of the site and also

the cost of construction of the building as well as the allowances payable under the Act, the rent for the building in question at the rate of 12 per cent. of the gross return would come to not less than Rs. 600 per month. The tenant, Sulaiman, Proprietor, Naaz Dry Cleaners, in his counter-statement to the rent control application stated that he had advanced a sum of Rs. 10,000 to the landlord on 13th January, 1965 without interest and hence it was agreed that a sum of Rs. 75 was reasonable rent for the above said premises. The building is about a century old and is not in a good condition and is without any amenity. There is no window or door or any kind of amenity such as water facility, electric light etc. Only the premises measuring '9½ x 16½' was let out to the tenant and the tenant at his own cost put up three tube lights, a collapsible spring gate in the front, paved the front portion with cement stones and put up some wooden racks and other furniture. Above the portion let out to the tenant there is another construction which is let out to some other tenant. There is no sky glass for passage of light. The building could not be classified even as Class IV building, and as such no allowance can be made as per section 4 (5) (*a*). The landlord is also not entitled to anything towards the cost of the amenities. The rent of Rs. 75 itself is a fair rent in view of the fact that the tenant had advanced a sum of Rs. 10,000 to the landlord without any interest.

2. The learned Rent Controller after considering the evidence let in before him fixed the fair rent for the premises at Rs. 340 per month from the date of the application. As against the said order the tenant filed an appeal in C.M.A. No. 308 of 1977 on the file of the Court of the appellate authority and the Principal Subordinate Judge, Madurai, and the learned appellate authority after going through the records and after hearing the arguments allowed the C.M.A. No. 308 of 1977 and fixed the fair rent for the above said premises at Rs. 194. Aggrieved by the above order this civil revision petition is filed by the landlord.

3. C.R.P. No. 2494 of 1978 relates to a neighbouring premises filed by the very same landlord against the order of the appellate authority in C.M.A. No. 309 of 1977 on the file of the appellate authority and the Principal Subordinate Judge of Madurai. Originally the landlord, the civil revision petitioner, filed R.C.O.P. No. 395 of 1974 on the file of the Court of the Rent Controller and the District Munsif of Madurai for fixing the fair rent for the petition-mentioned premises, occupied by one K. K. Viswanathan. The tenant was paying a rent of Rs. 49 per month. The case of the landlord before the Rent Controller is that the building is situate in a very important locality and the same was constructed within 18 years; that the building can be classified as Class I building, that the bus stand, railway station and cinema theatres are near to this building and that the building has got all the amenities and conveniences. Hence an allowance of 25 per cent. has to be allowed for the amenities. Further the building has internal water supply, sanitary and electrical installations and hence an allowance of 30 per cent. of the cost of the construction also will have to be allowed. It is also the case of the landlord that the market value of the site per square foot is not less than Rs. 200. The tenant, respondent, herein contended that the portion in his occupation is only 8' x 4' that the back portion and southern portion are enclosed by wooden plank, that the shop has zinc sheet doorway only, that the building is 60 years old and that the building can be classified only as Class III building. The tenant also contended that the market value of the site per square foot will not exceed Rs. 10 and the present rent of Rs. 49 per month itself is more than the fair rent. The learned Rent Controller considering the evidence both oral and documentary let in before him came to the conclusion that the market value of the site can be fixed at Rs. 200 per square foot and fixed the fair rent for the petition-mentioned premises at Rs. 100. As against the order of the Rent Controller the tenant filed an appeal in C.M.A. No. 309 of 1977 on the file of the Court of the appellate authority and the Principal Subordinate Judge, Madurai and the appellate authority after going through the records allowed the appeal in part and fixed the rent at Rs. 50 per month with effect from the date of application. As against the orders of the appellate authority in C.M.A. No. 309 of 1977, C.R.P. No. 2494 of 1978 is filed.

4. Since common questions arise in both the civil revision petitions, they are dealt with together.

5. The respondent in C.R.P. No. 2493 of 1978 died pending the above civil revision petition and hence the petitioner in the above civil revision petition filed C.M.P. No. 3354 of 1979 for impleading the legal representatives of the deceased Sulaiman, *viz.*, (1) Byrunisa Begum, (2) Shagil (minor aged 15 years), (3) Misha (minor aged 13 years), and (4) Shabnam (minor aged 11 years) and C.M.P. No. 3355 of 1979 to appoint Byrunisa Begum, the widow of the deceased Sulaiman, as the guardian of the minors. One Hajee Moosa Oma, a third party, filed a counter-affidavit in C.M.P. No. 3354 of 1979 stating that he is one of the partners of "Naaz Dry Cleaners and Launderers" and the deceased Sulaiman, the respondent in the civil revision petition, is his elder brother. He states in the counter-affidavit that the deceased Sulaiman, was not the proprietor of "Naaz Dry Cleaners" as shown in the cause title but was a partner of the business which was run in partnership among four brothers and this fact is referred to in the counter-affidavit filed in the rent control application itself. The above-said Sulaiman had retired from the partnership firm on account of his continued ill-health and from 1st April, 1978, the other two brothers and himself are the partners of the firm and the minor son of Sulaiman has been admitted to the benefits of the partnership. Hence the petition filed for bringing on record the personal legal representatives of the deceased Sulaiman as if he was the sole proprietor of the business is not maintainable, and only the partners of the partnership firm can be impleaded as party respondents in the civil revision petition. It is also stated in the counter-affidavit that Hajee Sulaiman Omar passed away on 22nd August, 1978 at the Christian Medical Hospital, Vellore and not on 12th December, 1978 as alleged in the petition. Hence the present petition filed after 30 days allowed under the Tamil Nadu Buildings (Lease and Rent Control) Act is barred by time.

6. The landlord filed a reply affidavit stating that he came to know about the death of Sulaiman only in the first week of February, 1979, and thereafter he immediately took steps for filing a petition for impleading the legal representatives of the deceased Sulaiman and in the second week of February, 1979, the said petition was filed and hence the application is not barred by time since he is entitled to file a petition within 30 days from the date of knowledge of the death of the deceased Sulaiman. The legal representatives of late Sulaiman who are the respondents in C.M.P. No. 3354 of 1979 remain *ex parte*.

7. C.R.P. No. 478 of 1981 is a petition filed by a third party, *viz.*, Naaz Dry Cleaners and Launderers, represented by Hajee Moosa Omar seeking to implead the petitioner in C.M.P. No. 478 of 1981 as respondent in C.R.P. No. 2493 of 1978. The averments in the affidavit in support of C.M.P. No. 478 of 1981 are as follows:—

8. Hajee Moosa Omar, the deponent of the affidavit in support of C.M.P. No. 478 of 1981 avers that he is one of the partners of "Naaz Dry Cleaners and Launderers", a partnership firm carrying on business as Launderers and dry clearners at Madurai in the petition-mentioned premises. In the rent control application the landlord had impleaded Sulaiman as the Proprietor of Naaz Dry Cleaners as respondent. Naaz Dry Cleaners and Launderers is a partnership firm in which Sulaiman, the deceased respondent, and the elder brother of the deponent were partners. This fact is also referred to in the counter-affidavit filed in support of the rent control application. Further, the landlord did not take any steps to amend the cause-title. Now that Sulaiman is dead, the landlord has filed an application in C.M.P. No. 3354 of 1979 to bring on record the personal legal representatives of Sulaiman as respondents in the civil revision petition. It is also averred in the affidavit that Sulaiman retired from the partnership firm on account of his ill-health and from 1st April, 1978 two of his brothers and himself are partners of the firm and the minor son of Sulaiman has been admitted to the benefits of the partnership. This partnership firm or its present partners are proper and necessary parties to the civil revision petition and they will have to be impleaded as party respondent to meet the ends of justice.

9. To this application the landlord filed a counter-affidavit with the following averments.

Haji Moosa Omar, the deponent of the affidavit filed in support of C.M.P. No. 478 of 1981, has no right, title or interest to represent the tenant. Though in the counter statement filed by the deceased Sulaiman in the rent control application filed against the Naaz Dry Cleaners and Launderers (tenant) for fixation of fair rent it was contended that the tenant is a partnership firm, the said contention was not seriously pressed or agitated in the proceedings. This would be evident from the fact that late Sulaiman filed the appeal in C.M.A. No. 308 of 1977 on the file of the appellate authority (against which the civil revision petition in C.R.P. No. 2493 of 1978 is filed) as sole proprietor of Naaz Dry Cleaners and Launderers. In the circumstances it is not open to Haji Moosa Omar to contend that he is entitled to represent the tenant on the death of Sulaiman and hence the landlord prayed for the dismissal of the C.M.P. No. 478 of 1981.

10. The above civil miscellaneous petitions Nos. 3354 of 1979, 3355 of 1979 and 478 of 1981 will have to be considered before the civil revision petition is taken up for consideration. In order of to dispose of these civil miscellaneous petitions we will have to ascertain who is the tenant in respect of the petition mentioned premises. It is the contention of the landlord that Sulaiman is the tenant. On the other hand the contention of the petitioner in C.M.P. No. 2493 of 1978 is that the partnership firm, Naaz Dry Cleaners with Sulaiman and his three brothers as partners is the tenant and that Sulaiman had retired from the partnership and that the other three partners along with a minor son of Sulaiman continued the partnership business and as such the partnership firm is the tenant. The partnership firm has also filed a petition in C.R.P. No. 478 of 1981 to implead the same as a party respondent to the civil revision petition. It also contended that C.M.P. No. 3354 of 1979 having been filed 30 days after the death of Sulaiman, which had occurred on 22nd August, 1978, is barred by time.

11. We will have to first consider the question whether C.R.P. No. 3354 of 1979 is belated and on that account the same is not maintainable. As per rule 25 of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974 every application for making the legal representative or representatives of the deceased person, party to the proceeding under the Act shall be preferred within one month from the date of the death of the person concerned or the date of having knowledge of the death of the person concerned. Hence according to rule 25 an application can be filed within 30 days from the date of knowledge of the death of the persons. Though in the affidavit in support of the petition in C.M.P. No. 3354 of 1979, there is no averment with reference to the fact that the landlord came to know about the death of Sulaiman only during the first week of February, 1979, the landlord filed a reply affidavit stating that he came to know about the death of Sulaiman only in the first week of February, 1979 and that he had filed the civil miscellaneous petition, thereafter, *viz.*, in the second week of February, 1979. In view of the averments in the reply affidavit that the landlord came to know about the death of Sulaiman during the first week of February, 1979 and inasmuch as this civil miscellaneous petition has been filed on 16th February, 1979 within 30 days from the date of knowledge. C.M.P. No. 3354 of 1979 to implead the legal representatives of the deceased tenant, cannot be said to be barred. Hence the objection that the said petition is barred by time is negatived..

12. The next question we will have to decide in the above civil miscellaneous petition is whether the tenant is an individual *viz.*, Sulaiman or the partnership firm consisting of Sulaiman and his three brothers as partners. In R.C.O.P. No. 415 of 1974 the landlord describes the tenant as Sulaiman (Proprietor) Naaz Dry Cleaners. In paragraph 4 of the counter-affidavit filed in R.C.O.P. No. 415 of 1974 it is stated that the tenant Sulaiman is not the sole proprietor of the business and he is only a partner. Thus in the earliest possible point of time the tenant had taken the plea that the respondent in R.C.O.P. No. 415 of 1974 is not an individual person but a partnership firm. But the question whether the respondent in R.C.O.P. No. 415 of 1974 is an individual person or a partnership firm was not gone into during the enquiry of the rent control application. In the appeal in C.M.A. No. 308 of 1977 before the appellate authority filed by the tenant the appellant is mentioned as Sulaiman (Proprietor) Naaz Dry Cleaners. But below the signature of the appellant in the grounds of appeal in C.M.A. No. 308 of 1977 a seal

which is usually used for the partnership firm is used and the appellant had also signed as partner. When the signature in the ground of appeal by Sulaiman is as partner, the cause-tile in the grounds of appeal as Sulaiman (Proprietor) Naaz Dry Cleaners can only be taken as a mere repetition of the cause title in the rent control application. An argument advanced on behalf of the landlord is that in view of the cause title in C.M.A. Nos. 308 and 309 of 1977 the tenant cannot now put forward the plea that the tenant is a partnership firm. It will have to be borne in mind that if the cause title is different from the rent control application the appellate authority will not entertain the appeal. For this reason and also because of the fact that Sulaiman had only signed as partner in C.M.A. No. 308 of 1977 from the mere fact that in the cause-title the appellant's name is mentioned as found in the rent control application the tenant cannot be debarred from putting forward the plea that the tenant is not an individual but a partnership firm. The true copy of the partnership deed dated 6th November, 1972, between Hajee Sulaiman and his three brothers *viz.*, Akbar Omar, Hajee Moosa Omar and Mohamed Ismail and the reconstituted partnership deed dated 1st April, 1978, between Akbar Omar, Hajee Moosa Omar and Mohamed Ismail which recites that Hajee Sulaiman retired from the partnership business due to his ill-health are produced for my perusal. On 26th March, 1979, the learned advocate for the tenant in the C.R.P. No. 2493 of 1978 wrote a letter to the advocate for the landlord stating that the tenant is described as Sulaiman (Proprietor) Naaz Dry Cleaners and Launderers and that he had entered appearance on behalf of Naaz Dry Cleaners and Laundarers which is a partnership firm represented by Hajee Moosa Omar, one of the partners and that Sulaiman who was originally one of the partners in the firm retired from the firm and died later on and requesting the advocate for the landlord to take necessary steps to amend the cause title of the civil revision petition. To this the learned advocate for the landlord replied that he had already filed a C. M. P. to bring on record the legal representatives of the deceased respondent and another C. M. P. for the appointment of the guardian for the minor legal representatives and if Hajee Moosa Omar was a partner of any firm and if other partners have to be brought on record, requested the advocate for the tenant to tile the necessary application. This circumstance is also canvassed by the learned advocate for the tenant as a circumstance in his favour. The facts and circumstances in the case clearly show that Naaz Dry Cleaners and Launderers was a partnership firm to begin with and it always continued as a partnership firm. Since the matter related only to the fixation of fair rent no attention was bestowed to the question whether the tenant is a proprietory concern or a partnership firm. But on this account the partnership firm cannot be made to suffer. From the available evidence and the circumstances in this case and taking into consideration the allegations in the counter statement to R.C.O.P. No. 415 of 1978 the capacity in which the appellant had signed C.M.A. No. 308 of 1977 before the appellate authority and the true, copies of the rent deeds produced for my perusal it is possible to conclude *prima facie* that the tenant is a partnership firm. In order to meet the ends of justice the reconstituted firm consisting of three partners of the erstwhile partnership firm will have to be impleaded as party-respondent in the civil revision petition. The respondents in C.M.P. No. 3354 of 1979 though served with notice have not come forward with any objection. Though there is sufficient material to show that Sulaiman, the deceased tenant, was only a partner in the Naaz Dry Cleaners and Launderers, yet, in order to have an effective adjudication in the matter, the legal representatives of late Sulaiman also will have to be impleaded as party-respondents to the civil revision petition. Hence C.M.P. No. 3354 of 1979 to bring on record the legal representatives of deceased Sulaiman and C.M.P. No. 3355 of 1979 to appoint Byruniza Begum, widow of Sulaiman as the guardian of the minor respondents 3 to 5 and C.M.P. No. 478 of 1981 to implead the re-constituted partnership firm *viz.*, Naaz Dry Cleaners and Launderers represented by Hajee Moosa Omar as party respondent in C.R.P. No. 2493 of 1978 are allowed.

13. Coming to the merits of C.R.P. No. 2493 of 1978, the learned Rent Controller arrived at the market value of the site on while the premises is situate at Rs. 200 per square foot. This has been done taking into

consideration Exhibit A-1, a registered sale deed, executed by the landlord himself with respect to a portion of the building just west of the petition-mentioned building and making allowance for the fancy price alleged to have fetched. Relying upon the Commissioner's report Exhibit C-1 the Rent Controller fixed the value of the superstructure at Rs. 10,622 and the age of the building at 50 years. Calculating the depreciation at one per cent. for 50 years and making allowance with regard to the amenities and adopting the statutory formula the learned Rent Controller arrived at the cost of the superstructure at Rs. 5,824. Adding the cost of the site of Rs. 28,950 with the cost of the superstructure the learned Rent Controller arrived at the total cost at Rs. 34,774 and fixed the fair rent at Rs. 348 per month for the petition mentioned premises.

14. As against the decision of the Rent Controller fixing the fair rent at Rs. 348 per month for the petition-mentioned premises the tenant filed an appeal in C.M.A. No. 308 of 1977. Before the appellate authority a curious procedure seems to have been adopted. The learned advocate for the landlord seems to have filed a memo. stating that the value of the building need not be taken into consideration and that the fair rent may be fixed on the value of the site alone. The learned appellate authority seems to have taken the memo. into consideration and reduced the fair rent fixed by the Rent Controller to Rs. 194 per month. It is argued on behalf of the landlord that the procedure for fixation of fair rent on the basis of the value of the site and the building is mandatory and the appellate authority ought not to have taken into consideration the memo. filed by the learned advocate for the landlord and fixed the fair rent on the value of the site alone. Section 4 of the Tamil Nadu Buildings (Lease and Rent Control) Act, under which the rent control proceedings were started reads as follows:—

"4. *Fixation of fair rent.*—The Controller shall on application made by the tenant or the landlord of a building and after holding such enquiry as he thinks fit, fix the fair rent for such building in accordance with the principles set out in the following sub-sections.

(2) The fair rent for any residential building shall be nine per cent. gross return per annum on the total cost of such building.

(3) The fair rent for any non-residential building shall be twelve per cent. gross return per annum on the toal cost of such building.

(4) The total cost referred to in sub-section (2) and sub-section (3) shall consist of the market value of the site in which the building is constructed, the cost of construction of the building and the cost of provision of any one or more of the amenities specified in Schedule I as on the date of application for fixation of fair rent:

Provided that while calculating the market value of the site in which the building is constructed, the Controller shall take into account only that portion of the site on which the building is constructed and of a portion upto fifty per cent. thereof of the vacant land, if any, appurtenant to such building the excess portion of the vacant land, being treated as amenity:

Provided further that the cost of provision of amenities specified in Schedule I shall not exceed—

(*i*) in the case of any residential building, fifteen per cent.; and

(*ii*) in the case of any non-residential building, twenty-five per cent.;

of the cost of site in which the building is determined under this section.

(5) (*a*) The cost of construction of the building including cost of internal water-supply, sanitary and electrical installations shall be determined with due regard to the rates adopted for the purpose of estimation by the Public Works Department of the Government for the area concerned. The Controller may, in appropriate cases, allow or disallow an amount not exceeding thirty per cent. of construction having regard to the nature of construction of the building.

(*b*) The Controller shall deduct from the cost of construction determined in the manner specified in clause (*a*), depreciation calculated at the rates specified in Schedule II".

15. On a reading of the above section it is clear that it is obligatory on the part of the

Rent Controller to take into consideration the market value of the site and the cost of construction of the building for fixing the fair rent. In view of the section we will have to consider whether the procedure adopted by the appellate Court for arriving at the fair rent excluding the cost of construction on the strength of the memo. filed by the learned advocate for the landlord is correct.

16. On behalf of the tenant it is contended that the appellate authority acted rightly in taking into consideration the memo. filed by the learned advocate for the landlord, who is duly authorised as per the terms of the vakalat to act on his behalf. Reliance is also placed upon the following cases by the learned advocate for the tenant.

17. In the case reported in *Sourendra Nath Mitra and others* v. *Tarubala Dasi*[1], it has been held that an advocate of the High Court, when briefed on behalf of a party in a Subordinate Court, has got the implied authority of his client to settle the suit. In the case reported in *Govindammal* v. *Marimuthu Maistry and others*[2], a single Judge of this Court observed that, even in cases where there is no express authorisation to enter into a compromise, under the inherent authority impliedly given to the advocate he has power to enter into a compromise on behalf of his client. But, in the present state of the clientele world and the position in which the Bar now finds itself and in the face of divided judicial authority and absence of statutory backing, prudence dictates that, unless express power is given in the vakalat itself to enter into compromise, in accordance with the general practice obtaining, a special vakalat should be filed or the specific consent of the party to enter into the compromise should be obtained. It is also observed that, if the endorsement is made on the plaint, etc., it would be better to get the signature or the thumb impression of the party affixed thereto, making it evident that the party is aware of what is being done by the advocate on his or her behalf. In the case reported in *Smt. Jamilabi Abdul Kadar* v. *Shankarlal Gulabchand and others*[1], the Supreme Court observed that an advocate is entitled to enter into a compromise unless the party withheld the power of compromise by a specific term in the vakalat. In the case reported in *Employers in relation to Monoharbahal Colliery, Calcutta* v. *K. S. Mishra and others*[2], the Supreme Court held that a compromise signed by the counsel is binding on the party. In the case reported in *The Madras Co-operative Printing and Publishing Society Limited, Madras, represented by its Secretary* v. *O. Ramalingam and others*[3], a single Judge of this Court observed that the counsel appearing for a party is always having an implied authority to enter into a compromise on behalf of this party. The only limitation is that, if there was any written prohibition or limitation, he will have to act within that prohibition or limitation.

1. (1930) 58 M.L.J. 551: 31 L. W. 803: L.R. 57 I.A. 133: A.I.R. 1930 P. C. 158.
2. (1957) 70 L.W. 818: (1958) 2 M. L.J. 34: A.I.R. 1959 Mad. 7.

18. The fact that an advocate is entitled to sign on behalf of the party in the proceedings for compromise is reiterated in the above decision. But in this case there is no compromise petition as such. We find only a memo. filed by the learned advocate the recitals of which are as follows:—

> "In the above matter if the Court considers that the cost of construction of the building arrived at is not in conformity of section 4 (5) of the Act, this respondent humbly submits that he will be satisfied if the fair rent is fixed on the site value".

19. Sub-section (5) of section 4 of the Act relates to the adoption of P.W.D. rates in respect of calculation of the cost of the buildings. The memo. only states that if the Court considers that the cost of the building arrived at is not in conformity with section 4 (5) then fair rent may be fixed on the site value. The appellate authority proceeded on the basis that the same is to the effect that the cost of construction need not be taken into account for the purpose of fixation of fair rent. But the memo. if construed in the proper perspective can only

1. (1975) 2 S.C.W.R. 307.
2. (1975) 2 S.C.C. 244: A.I.R. 1975 S.C. 1632.
3. (1976) 1 M.L.J. 136.

seen that if the appellate authority comes to the conclusion that the calculation of the cost of construction is not in accordance with section 4 (5) then only the Court can fix a fair rent on the basis of the cost of the land alone. There is no specific finding by the appellate authority that the calculation of the cost of construction of the building is not in accordance with section 4 (5) of the Act. In the absence of such finding the appellate authority is not entitled to act as per the memo. filed by the learned advocate for the landlord.

20. In this connection it will also have to be borne in mind that the memo. filed is not is the nature of a compromise petition signed by both the advocates and the parties. It is not even signed by the advocate for the tenant and in fact on the reverse side of the memo there is an endorsement that the advocate for the appellant, *viz.*, the tenant refused to take notice. Under the circumstances the principles laid down in the above cases regarding the authority of the advocate to sign compromise petitions cannot be applied to the facts of this case.

21. In view of the mandatory provisions in section 4 of the above said Act, that in fixing the fair rent the Rent Controller shall take into consideration the cost of the building, the appellate authority is not justified in acting on the memo and excluding the cost of construction of the building and arriving at the fair rent taking into consideration the cost of the land alone. Considering the entire circumstances the grievance of the civil revision petitioner in this regard is justified.

22. Even in arriving at the cost of vacant site the learned appellate authority had not adopted the evidence let in in this case. So far as the evidence in this case is concerned we have the sale deed Exhibit A-1 filed in R.C.O.P. No. 415 of 1974 in respect of a portion of a building just west of the petition-mentioned building measuring 127 sq.ft. This sale deed comprises of the building and the site and the value of the site will have to be arrived at after arriving at the cost of the building and deducting the same from the sale price mentioned in Exhibit A-1. If it is seen that the purchaser had paid a fancy price in respect of the transaction as contended by the tenant due allowance will have to be made for the same. The fixation of market value for the purpose of Urban Land Tax for the premises in question may also afford a criterion for the purpose of fixing the market value of the site. Exhibits B-1, B-2 and B-3 filed in C.M.A. No. 309 of 1977 are the orders of the Urban Land Tax Tribunal in respect of lands in Town Hall Road, Madurai. It is not known whether these orders relate to the site on which the petition-mentioned building stands. In any event the value fixed by the urban land tax authority at the time of the application for the fixation of fair rent will also be a factor in deciding the value of the site. The appellate authority without calculating the value of the site, on the evidence available determined the fair rent at Rs. 100 per month on a rough and ready basis. On going through the orders of the appellate authority it is seen that the appellate authority had not taken into consideration the data available in respect of the value of the site in the proper perspective and that it had not arrived at the proper value of the site on which the building is situate.

23. If there is a first floor in the premises then the market value of the vacant site will have to be apportioned between the ground floor and the first floor. In the case reported in *S. Attendrooloo Chetty's Charities by its President and S. Venkatarangam and others* v. *Sadhana Aushadalaya by its Proprietor Naresh Chandra Ghose*[1], it has been held that in the case of premises having storeys the value of the site will have to be apportioned between the storeys. In the case reported in *R. Sivagnanam and another* v. *Everest Boarding and Lodging by its Managing Partner, R. Manoharan*[2], a single Judge of this Court observed that there is nothing in the Act which requires the assignment of the entire land cost to the ground floor alone. The appellate authority in this case observed that there is an upstairs for the premises but no deduction need be made from the cost of the land since the value of the building is not taken into consideration. The reasoning given by the appellate authority for not taking into consideration the cost of construction of the building and for not taking into consideration the existence of the upstairs in arriving

1. (1968) 2 M.L.J. 406.
2. (1969) 1 M.L.J. 101.

at the value of the site are not correct. Hence the order of the appellate authority cannot be sustained and the same will have to be set aside.

24. In C.R.P. No. 2494 of 1978, the learned Rent Controller arrived at the market value of the site on which the premises is situate at Rs. 200 per square foot. This has been done taking into consideration Exhibit A-1, a registered sale deed, executed by the landlord himself with respect to a portion of the building just west of the petition-mentioned building and making allowance for the fancy price alleged to have been paid. Relying upon the Commissioner's report, Exhibit C-1, the learned Rent Controller fixed the value of the superstructure at Rs. 1813 and the age of the building at 50 years. Calculating the depreciation at one per cent. for 50 years and making allowance with regard to the amenities and adopting the statutory formula, the learned Rent Controller arrived at the cost of the superstructure at Rs. 1,093. Adding the cost of the site as Rs. 8,870 with the depreciated value of the superstructure the learned Rent Controller arrived at the total cost of Rs. 9,963 and fixed the fair rent at Rs. 100 per month for the petition-mentioned premises.

25. As against the decision of the Rent Controller fixing the fair rent at Rs. 100 per month for the petition-mentioned premises the tenant filed an appeal C.M.A. No. 309 of 1977. The learned appellate authority disposed of the above C.M.A. along with C.M.A. No. 308 of 1977 by means of a common order and reduced the fair rent to be fixed for the petition-mentioned premises to Rs. 50 per month. The appellate authority also without calculating the value of the site on the evidence available determined the fair rent at Rs. 50 per month on a rough and ready basis. On going through the order of the appellate authority it is seen that the appellate authority had not taken into consideration the data available in respect of the value of the site in the proper perspective and that it had not arrived at the proper value of the site on which the building is situate. Hence the order of the appelate authority cannot be sustained and the same will have to be set aside.

26. Hence the orders of the appellate authority in the above two appeals are set aside and both the matters are remitted back to the appellate authority for fresh disposal after taking into consideration:—

1. The value afforded by the sale deed Exhibit A-1 and the value fixed by the Urban Land Tax Authorities for similar lands in the vicinity and any other evidence with reference to the value of the land that may be forthcoming after making due allowance for extraordinary circumstances that may be brought out; and

2. the value of the construction according to P.W.D. rates in respect of the premises in question.

The appellate authority is directed to arrive at the market value of the buildings on the principles mentioned above and arrive at the fair rent payable by the tenant in both the cases.

27. In the result both the civil revision petitions *viz.*, C.R.P. Nos. 2493 and 2494 of 1978 are allowed and both the matters are remitted back to the appellate authority for fresh disposal in the light of the observations made above. There will be no order as to costs in both the civil revision petitions. C.M.P. Nos. 3354 of 1979, 3355 of 1979 and 478 of 1981 are also allowed.

R.S. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Padmanabhan, J.*

The Provincial Superior, Cluny Convent, Malleswaram, Bangalore-3

.. *Petitioner**

v.

The State of Tamil Nadu, represented by the Deputy Secretary to Government, Home (Cinemas) Department, Fort St. George, Madras-9 and others

.. *Respondents.*

Tamil Nadu Cinemas (Regulation) Act (IX of 1955) and Rules framed under the Tamil Nadu Cinemas (Regulation) Act, Rule 106-A—"Any objection filed after this period shall be liable to be summarily rejected"—Meaning of "liable"—Non-objector if "aggrieved person" — Licensing authority can receive and deal with objections filed beyond 15 days.

Held: The word 'liable' in rule 106-A of the Rules under the Tamil Nadu Cinemas Regulation Act has also the meaning of being bound or obliged according to law. In other words, when it is said that 'any objections filed after a period of 15 days shall be liable to be summarily rejected', it means that there is an obligation on the part of the authority to summarily reject an application filed beyond that time. This conclusion is further supported by the use of the word 'summarily' which means that the rejection should be done by a short method without unnecessary formalities or delay and without further application of mind. [*Para.* 8.]

The provision under rule 106-A, which permits a member of the public to prefer his or her objections to the grant of a licence within 15 days from the date of the notification is mandatory. If an objection is filed beyond the 15 days time, such an objection has no validity in law and it cannot be taken note of. The licensing authority has no jurisdiction to entertain an objection that is filed by a member of the public beyond the period of 15 days under rule 106-A and deal with the same on merits. Even if the Collector or the licensing authority deals with such a belated objection and grants a no-objection certificate to the applicant, the objector who has filed a belated objection will have no *locus standi* either to file an appeal or revision before the appropriate authorities. Such a person cannot be said to be an aggrieved person. Consequently, the writ petitioner is not an aggrieved person. She had no *locus standi* to file an appeal or revision before the appropriate authorities. Equally she has no *locus standi* to file this writ petition.

[*Para.* 14.]

Case referred to:—

K. S. P. Subramanian v. *Commissioner of Land Revenue and Commercial Tax,* (1981) 94 L.W. 380: A.I.R. 1981 Mad. 346.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the proceedings of the first respondent, dated 3rd February, 1981 in Government letter No. 149647|Cinemas|80-5 Home Department and of the second respondent in B.P. Rc. No. 4036 (L), dated 22nd September, 1980 granting a no-objection certificate to the 4th Respondent for locating a Touring Cinema in S. No. 377|2 of Devikapuram Village in Arani Taluk, North Arcot District and quash the said proceedings of the 1st respondent, dated 3rd February, 1981 confirming the order of the 2nd respondent in B.P.Rt. No. 4036 (L), dated 22nd September, 1980.

R. D. Indrasenan, for Petitioner.

G. Ramaswamy, for *S. Shanmughavelayutham* and *K. R. Govindarajan,* for Respondent No. 4.

S. Jagadeesan, for Government Pleader, for Respondent Nos. 1 to 3.

The Court made the following

ORDER.—The question that arises for determination in this writ petition is whether a person who does not file any objection to an application for a temporary permit before the licensing authority within the period of 15 days

*W.P. No. 1121 of 1981.

22nd January, 1982.

as provided for under rule 106-A of the Rules under Tamil Nadu Cinemas (Regulation) Act (hereinafter referred to as the Rules) can be said to be an aggrieved person.

2. The facts of the case may be set out as follows. The petitioner is the Provincial Superior, Cluny Convent, Malleswaram, Bangalore. The Cluny Convent runs a health centre styled Nirmala Rani Health Centre in Devikapuram village in North Arcot District. The health centre is said to cater to about 30 villages in and around the neighbourhood. It is said that annually 25,000 persons attend the dispensary run by the health centre. The convent is also running a nursery school. While so, the 4th respondent filed an application before the Collector of North Arcot, the third respondent herein, for the grant of a no objection certificate for locating the touring cinema in S.No. 377|2 of Devikapuram village. The petitioner objected to the issue of the no objection certificate on the ground that the location of a cinema would be a nuisance and hindrance to the health centre. The petitioner also stated that the convent was building a maternity centre and the location of the touring cinema would fall within the prohibited distance of 76.4 metres of the maternity centre. The public of the village also raised similar objections, apart from the further objection that there were two huts within the prohibited distance of 30.5 metres of the site on which touring cinema is sought to be located. The third respondent made a local inspection on 24th October, 1979. He then rejected the application of the 4th respondent on two grounds. The first ground is that a maternity hospital is coming up within a distance of 76.4 metres from the site and that the local inspection has revealed that the building has come up to the roof level. According to the third respondent the location of the touring cinema would be a nuisance to the hospital. Secondly, he found that there are two huts occupied by Erulavs within a distance of 27 metres from the proposed site.

3. Against the said order the 4th respondent preferred an appeal before the Board of Revenue, Madras. The Commissioner of Land Revenue and Commercial Taxes, the second respondent herein, set aside the order of the third respondent and directed the latter to issue a no-objection certificate to the 4th respondent. The appellate authority overruled the objection based on the location of the huts within a distance of 27 metres of the proposed site on the ground that under the new Rules touring cinemas should be constructed only with inflammable materials. The appellate authority also overruled the objection based on the situation of the maternity hospital on the ground that the respondent before him, *viz.*, the petitioner herein did not appear at the hearing. The petitioner then preferred a revision petition before the Government; the first respondent dismissed the revision petition by its order, dated 3rd February, 1981. In these circumstances, the petitioner has filed this writ petition, for the issue of a writ of *certiorari* to quash the order passed by the first respondent on 3rd February, 1981 confirming the order passed by the second respondent granting a no-objection certificate to the 4th respondent.

4. Mr. Indrasenan, the learned counsel, for the petitioner vehemently attacked the order of the appellate authority, the second respondent herein which has been confirmed by the first respondent by a non-speaking order on the ground that the appellate authority had passed an *ex parte* order without hearing the petitioner. According to the learned counsel, the petitioner was present on a number of occasions, for the hearing. Unfortunately, on the particular date on which the appellate authority disposed of the matter, the petitioner could not be present for reasons beyond her control. In any event, according to Mr. Indrasenan, the appellate authority should have gone into the question whether the installation of a touring cinema on the proposed site would be a nuisance to the maternity hospital that was coming up, particularly when the Collector, after local inspection, had found that the touring cinema on the proposed site would be a nuisance to the maternity hospital. Mr. Indrasenan also contended that the appellate authority should have considered whether rule 103 of the Rules had been violated particularly when the Collector has on local inspection found that the proposed site for the touring cinema was within the prohibited distance from the maternity hospital and the huts. I would have been inclined to accept the argument of Mr. Indrasenan and to remand the matter to the appellate authority for a fresh disposal but for the preliminary objection raised by Mr.

G. Ramaswami, the learned counsel for the 4th respondent regarding the maintainability of the writ petition.

5. Mr. G. Ramaswami, the learned counsel for the 4th respondent argued that rule 106-A enjoined that any member of the public who objected to the grant of a no objection certificate to an application should prefer his or her objections in writing before the licensing authority within fifteen days of the publication of the notice regarding the receipt of an application. If no objection is filed within 15 days, then the licensing authority would not be competent to consider any such objection. Mr. Indrasenan clearly and fairly admitted that the petitioner did not prefer her objections within 15 days as provided for under rule 106-A. However, the learned counsel contended that it would be open to the licensing authority to receive and deal with the objection preferred by a member of the public even after 15 days. If the licensing authority, according to Mr. Indrasenan, does not choose to reject the objection filed by a member of the public after the expiry of the 15 days, but receives the same and deals with it on the merits, then it could not be said that such an objection is not valid and that the licensing authority has no jurisdiction to deal with the same. The question for determination is which of the contenions has to be sustained.

6. Section 5 of the Tamil Nadu Cinemas (Regulation) Act, 1955 (hereinafter called the Act) confers power on the licensing authority to grant or refuse a licence. Rule 35 of Part II (*a*) deals with the approval of location of permanent cinemas. Rule 100 of the Rules states that a person who intends to build a travelling cinema building shall follow the procedure in rule 35 in Part II (*a*). Rule 106-A reads as follows:

> "On receipt of the application, the licensing authority shall cause a notice to be published in the notice board of the office of the licensing authority and the Panchayat Union concerned, of the fact of receipt of the application, with such details as may be considered necessary and calling for objections if, any, from the public in regard the non-compliance by the applicant of the provisions of any these rules. All objections shall be filed in writing before the licensing authority within 15 days from the date of publication of the notice. Any objection filed after this period shall be liable to be summarily rejected".

The above rule contemplates the following: on receipt of an application for the issue of a no objection certificate the licensing authority shall cause a notice to be published in the notice board of the office of the licensing authority and the panchayat union. The notice must also invite objections, if any, from the public in regard to the non-compliance by the applicant of the povisions of any of the rules. The public should file their objections in writing before the licensing authority within 15 days from the date of publication of the notice. Any objection filed after the expiry of the period of 15 days shall be liable to be summarily rejected. There was no dispute at the Bar that the final decision of the writ petition would depend upon the interpretation to be placed on rule 106-A. According to Mr. G. Ramaswami, the licensing authority is not entitled to look into any objection that may be received after the expiry of 15 days from the date of publication of the notice; but in the submission of Mr. Indrasenan it will be open to the licensing authority either to reject the application or receive and consider the same. Though the matter is not *res integra,* since Mr. Indrasenan challenges the correctness of some of the earlier decisions of this Court cited by Mr. G. Ramaswami I shall consider the question *de hors* the decisions cited by him. The language used in rule 106-A is "all objections shall be filed before the licensing authority within 15 days from the date of the publication of the notice".

7. It is one of the well-settled canons of interpretation of statutes that when a statute uses the word 'shall' it shall ordinarily be construed to be mandatory. However, it is sometimes not so interpreted, if the context or the intention otherwise demands and in such cases the word is interpreted only to have directory effect. In this case, the last sentence in rule 106-A reads:

> "Any objection filed after this period shall be liable to be summarily rejected".

Mr. R. D. Indrasenan drew my attention to the various meanings of the word 'liable'

culled out from different dictionaries and stated that the fact that the word 'liable' is used confers a discretion on the licensing authority either to accept or summarily reject an objection that is filed beyond time. The learned counsel referred to the Law Lexicon by T. P. Mukherjee and K. K. Singh (1971) Volume II, page 32, wherein it is stated that the word 'liable' means a future possibility or probability happening which may or may not actually occur--it is discretionary. In Funk and Wagnalls' Standard Dictionary, International Edition, Volume I, page 734, one of the meanings given to the word 'liable' is 'having a tendency, inclination or likelihood, likely, with unfavourable sense'. The same dictionary also gives the meaning as exposed to damage, penalty, expense, burden etc.' One of the meanings given to the word 'liable' in the Compact Edition of the Oxford English Dictionary, Volume I (1977), page 1611 is 'bound or obliged by law or equity or in accordance with a rule or convention, answerable'. Similarly, Webster's Third New International Dictionary (1968), page 1302, explains the word 'liable' as being bound or obligated according to law. K. J. Aiyer, in his Judicial Dictionary 8th Edition 1980, page 577, gives the meaning of the word 'liable' with reference to section 381, Indian Penal Code, as a future possibility or probability happening which may or may not occur. In other words, it is stated that the Magistrate has the power to impose the sentence of fine under section 381, Indian Penal Code, but it is discretionary. Stroud in his Judicial Dictionary of Words and Phrases, 4th Edition, page 144, states that the word 'answerable' is an equivalent for 'liable'. Collins English Dictionary (1970), gives the meaning of the word 'liable' among others as being subject or state of being liable or obligation. In 'Words and Phrases' Permanent Edition, Volume 25, page 71. Webster defines 'liable' thus:—"Obliged in law or equity, subject" and says 'it denotes something which may befall us'.

8. From the above it is clear that the word 'liable' has also the meaning of being bound or obliged according to law. In other words, when it is said that 'any objection filed after a period of 15 days shall be liable to be summarily rejected' it means that there is an obligation on the part of the authority to summarily reject an application filed beyond the time. This conclusion is further supported by the use of the word 'summarily' which means that the rejection should be done by a short method without unnecessary formalities or delay and without further application of mind. Rule 106 reads thus:—

> "After consideration of the application made under rule 100 with reference to the matters specified in section 5 (1) of the Act, and objections, of the local authority or the police, the licensing authority shall grant a No Objection Certificate in Form 'B' or may refuse to grant it within one month after the receipt of the remarks of the local authority and the Police or within fifteen days of the receipt of the further report where such a report has to be obtained. A copy of the order shall be communicated to the applicant and to the persons if any who have filed objections before the licensing authority".

It is therefore clear that rule 106 has prescribed that an order granting or refusing to grant a No Objection Certificate should be passed within one month after the receipt of the remarks of the local authority and the Police or within 15 days of the receipt of a further report where such a report has to be obtained. Rule 35 (3) of the Rules, which is also applicable to the grant of a No Objection Certificate for a touring Cinema by virtue of rule 100, provides that a copy of the application shall be sent to the Deputy Commissioner of Police, Traffic and Licensing, Madras, or the District Superintendent of Police in mufassal, who shall remit it, within one month from the date of receipt of the application from the applicant to the licensing authority with objections, if any, from the traffic point of view. The note appended to rule 35 (3) states that on receipt of the application from the applicant, the licensing authority shall ensure from the local authority and the police that they have received copies of the application and ascertain date of their receipt to avoid non-receipt or delay in receipt of the copies of the authorities concerned. If no reply is received within the time prescribed in sub-rules (2) and (3), it shall be presumed by the licensing authortiy that there is no objection.

9. It is therefore clear that so far as the police is concerned, the time-limit granted for submission of their report is one month from the date of the receipt of the application from the applicant to the licensing authority. The note appended to the sub-rule further provides that if no reply is received within the time prescribed, it shall be presumed by the licensing authority that there is no objection. In the context of the procedure laid down for the grant of a No Objection Certificate, it is clear that the time-limit of 15 days for objections being received from the public is mandatory. The word 'shall' used in rule 106-A has necessarily to be construed only in a mandatory sense. If so construed, the licensing authority will have no discretion to entertain an objection filed after the period of 15 days. Mr. R. D. Indrasenan himself was compelled to concede that the language of rule 106-A does not expressly or impliedly confer any power on the licensing authority to entertain an objection after the period of 15 days by excusing the delay. His only argument is that in view of the fact that the word 'liable' is used in rule 106-A, the Court should so interpret the rule as to confer a discretion on the authority to entertain an objection received even after the expiry of 15 days. I am unable to accept the argument of the learned counsel.

10. In this context, it is necessary to refer to one more circumstances. If really the intention of the rule-making authority was to confer a power on the licensing authority to entertain an objection received after the period of 15 days, nothing prevented it from expressly saying so. Further no guidelines have been given in rule 106-A or in any other rule as to the circumstances in which the licensing authority can entertain an objection preferred by a member of the public after the expiry of 15 days. The Court cannot assume that the rule-making authority would have conferred an uncanalised or unguided power on the licensing authority to entertain an objection after the expiry of 15 days, particularly when the other rules make it clear that there should be reasonable expedition in the disposal of the application filed by the applicant for the issue of a no-objection certificate.

11. As already stated, my conclusion that rule 106-A is mandatory is supported by a catena of decisions of this Court. The question came up for consideration before a Bench of this Court in *P. S. Somasundaram* v. *The Board of Revenue*[1]. One of the questions that was considered by the Bench was whether an existing cinema operator would have a right of representation as envisaged by section 5. This was answered by the Bench in the affirmative. The other question which the Bench considered was the effect of non-compliance of the provisions of rule 106-A in the matter of preferring objections. After considering the scope of rule 106-A, the learned Judges observed as follows:—

> "It is contended for the respondents that the appellant has a right of representation. That is undoubtedly so. But under the rule-making power, it is open to the rule making authority to provide for limitation. Providing of limitation is not to destory the right but to limit the time within which the right can be enforced. On that view of the matter, the appeal filed by the respondents was incompetent".

In other words, the Bench took the view that a member of the public who does not file the objections within the time prescribed under rule 106-A could not be an aggrieved person.

12. Mr. Indrasenan sought to distinguish this judgment on the ground that in the case before the Bench the writ petitioner had not filed any objections at all. Consequently, the Bench took the view that the person concerned could not be treated as an aggrieved person within the meaning of section 5 (7). The learned counsel particularly emphasised upon the following observations:—

> "All objections under that rule shall be filed in writing before the licensing authority within 15 days from the date of pubilcation of the notice. The rule further prescribes that any objection filed after the period shall be liable to be summarily rejected. That means that if the authority rejected the representations on the ground that they were filed out of time, the representator would have no further right to be

1. W.A. No. 63 of 1973.

heard. The case of respondents 2 and 3 is worse. They made no representaions".

From this the learned counsel wanted me to draw the inference that the Bench impliedly meant to say that the authority could have accepted the representations even after the expiry of 15 days. I am unable to understand the Bench decision in the way in which the learned counsel wants me to do. In fact on the very same ground the Bench judgment was sought to be distinguished before Mohan, J., in (*K. A. Kolandaisami* v. *The Board of Revenue*[1]). The learned Judge observed as follows:—

"In law, where there were no objections or there were belated objections, it would mean the same thing as though there were no objections. Viewed in this fashion, I am unable to appreciate the distinction that is sought to be placed by the learned counsel stating that the above decision will have no application, because that was a case of no representation".

Mohan, J., followed his decision in *K. A. Kolandaisami* v. *The Board of Revenue*[1]. in *Shri Ram Theatre by Partner* v. *The District Collector of Coimbatore*[2], where an objection had been filed by an existing cinema operator after the expiry of 15 days. The learned Judge held that in view of the Bench decision in W.A. No. 63 of 1973 and his own decision in W.P. No. 3505 of 1979, the writ petitioner was not an aggrieved person.

13. Sathiadev, J., had to consider the same question in W.P. No. 4442 of 1978. The subject-matter of that writ petition fell within rule 35-A of the Rules. The Collector of Tiruchirapalli granted a no-objection certificate to the writ petitioner. On appeal by a member of the public, the Board of Revenue set aside the order of the Collector and permitted the applicant therein to file the necessary application after the construction of the building. Mr. Indrasenan who appeared for the writ petitioner before the learned Judge took the stand that under rule 35-A, any objections received beyond the period of 15 days from the date of the publication of the notice could not be entertained. In that case, the objection petition filed by the third respondent was beyond the period of 15 days. Notwithstanding the belated nature of the objections, the Board took the view that the objections had to be considered by the Collector and, therefore, proceeded to set aside the order of the Collector. The learned Judge after referring to the order of the Collector and the Board of Revenue observed as follows:—

"When both these constituted authorities, have been aware of the objections having been filed beyond time, the third respondent has no *locus standi* to be heard on such objections. Even if the objections have been dealt with in the orders they are irrelevant and opposed to a specific prohibition found in rule 35-A. If such objections are taken into account and conclusions are arrived at thereon, it would vitiate the order itself".

The learned Judge finally set aside the order of the Board of Revenue and made the rule *nisi* absolute.

14. Nainar Sundaram, J., in *Kancheepuram Municipality represented by the Municipal Commissioner* v. *The Government of Tamil Nadu*[1], had to deal with a similar situation. The subject-matter fell within rule 35-A of the Rules. The fourth respondent therein who was the objector filed his objections beyond the period of 15 days from the date of the notification. The learned Judge has observed as follows:—

"An objection from a member of the public, if not made within the time prescribed by rule 35-A of the Rules, has got to be summarily rejected, is stipulated in the said rule itself. Such an objector has no audience at all before the licensing authority and even if the order goes against him and in favour of the applicant, the objector has no *locus standi* to agitate the matter further by way of an appeal, is a well-settled proposition, because such an objector cannot

1. W.P. No. 3505 of 1979.
2. W.P. No. 4523 of 1979.

1. W.P. No. 3510 of 1980.

be deemed to be an aggrieved person. The failure to make objection within the time stipulated under rule 35-A of the Rules by any member of the public can only lead to the conclusion that no member of the public has any grievance against the grant as such. When the rule is explicit, stipulating summary rejection of such belated objections, it is not proper on the part of the authorities concerned to take note of and countenance such objections and reject the application of the petitioner—municipality on that basis. A view, similar to the one which I have taken has also been expressed by Mohan, J., in *Subramanian, K. S. P.* v. *Commissioner of Land Revenue and Commercial Tax*[1]."

Nainar Sundaram, J., had also to deal with a similar situation in W.P. No. 452 of 1981 on 13th November, 1981. There, notwithstanding the belated objections filed by the writ petitioner a no-objection certificate was issued to the fourth respondent therein. An objection was taken before the appellate authority by the successful applicant that the objector was not entitled to be heard on merits in view of the fact that his objections were belated. However, the appellate authority took the view that since the Collector had not passed a specific order summarily rejecting the belated objections, it would be safer to entertain the appeal and dispose of the same on merits. However, on merits the appellate authority found that there was no case for interference. A further revision by the objector to the Government also failed. Consequently, the objector preferred a writ petition before this Court to quash the order of the Appellate Authority as confirmed by the revisional authority. A preliminary objection was taken on behalf of the successful applicant who was the fourth respondent in the writ petition stating that the objector could not be classified as an aggrieved person and both his appeal and revision could not have been entertained at all by the appellate authority and the revisional authority. After referring to the judgment of Mohan, J., in W.P. No. 3510 of 1980 and *Subramanian, K. S. P.* v. *Commissioner of Land Revenue and Commercial Tax*[1], the learned Judge observed as follows:—

"There is no ambiguity with reference to the legal position. Such being the case, the appeal and the revision at the instance of the petitioner ought not to have been entertained at all as having been preferred by a person who cannot be classified as an aggrieved person. The third respondent did the right thing in not adverting to the objections of the petitioner, which were out of time. Even though the second respondent has advanced other reasons for dismissing the appeal, the order of dismissal has to be sustained on the ground that such an appeal was incompetent at the instance of the petitioner, who is not an aggrieved person. The same reasoning would apply to sustain the order of dismissal of the revision by the first respondent."

The following principles emerge from the above analysis. The provision under rule 106-A, which permits a member of the public to prefer his or her objections to the grant of a licence within 15 days from the date of the notification is mandatory. If an objection is filed beyond the 15 days time, such an objection has no validity in law and it cannot be taken note of. The licensing authority has no jurisdiction to entertain an objection that is filed by a member of the public beyond the period of 15 days under rule 106-A and deal with the same on merits. Even if the Collector or the licensing authority deals with such a belated objection and grants a no-objection certificate to the applicant, the objector who has filed a belated objection will have no *locus standi* either to file an appeal or revision before the appropriate authorities. Such a person cannot be said to be an aggrieved person. Consequently, I have no hesitation in holding that the writ petitioner is not an aggrieved person. She had no *locus standi* to file an appeal or revision before appropriate authorities. Equally she has no *locus standi* to file this writ petition.

15. Mr. Indrasenan raised another contention that even though the objection filed by the writ petitioner was belated, the appellate

1. (1981) 94 L.W. 280; A.I.R. 1981 Mad. 346.

1. (1981) 94 L.W. 380; A.I.R. 1981 Mad. 346.

authority was under a statutory duty to consider whether the third respondent had complied with all the conditions required under rule 103. In this particular case, according to Mr. Indrasenan, the appellate authority had failed to consider the same. The learned counsel argued that his duty was all the more important because the Collector had found on a local inspection that the location of a touring cinema at the proposed site would be a nuisance to the maternity hospital. In fact, this identical contention was urged by Mr. Indrasenan himself before Mohan, J., in W.P. No. 3505 of 1979, where the learned Judge has observed as follows:—

> "If, therefore, the petitioner is not an aggrieved person, as held in *Somasundaram's case*[1], I cannot consider whether the impugned orders are valid in so far as they have failed to consider the adequacy as required under section 5 (1) (*d*) of the Tamil Nadu Cinemas (Regulation) Act, 1955. In other words, it is not open to the petitioner to say that notwithstanding himself being not an aggrieved person, this Court must enforce the statutory obligations enjoined on the authorities in deciding the adequacy or suitability, as the case may be. He will have to make out that he is an aggrieved person before he can call upon this Court to examine the correctness of the order passed. This the writ petitioner has failed to do in this case."

I respectfully adopt the ratio laid down by Mohan, J., in the above judgment. Before the petitioner can invite this Court to apply its mind to the correctness or otherwise of the impugned order passed by the appellate authority as confirmed by the revisional authority, the petitioner has to make out that he or she is an aggrieved person. When once I come to the conclusion that the petitioner is not an aggrieved person, it is not open to the petitioner to say that even though her objections might be belated, this Court can consider the correctness of the order.

16. The writ petition, therefore, fails and is dismissed; but in the circumstances, without costs.

R.B. —— *Petition dismissed.*

1. W.A. No. 63 of 1973.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— *S. Mohan, J.*

Punithammal and others .. *Petitioners**

v.

Krishna Mudaliar .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973)—Petition for eviction pending—Death of landlord—Some legal representatives added—Daughter of deceased left out—Continuance of eviction petition by the other legal representatives—Order of eviction if can be passed—Whether estate of the deceased was fully represented—Application whether maintainable.

Held: Inasmuch as the majority of the legal representatives were eager to prosecute the application for eviction, it was not open to the tenant to say that the failure to implead one or two legal representatives would be fatal to the petition. In view of the decision reported in *Dalai Mallike* v. *Krushna Chandra*, (1967) 2 S.C.J. 149: A.I.R. 1967 S.C. 49, it will be open to the petitioners herein to continue the application for eviction filed by the deceased landlord. The order for eviction passed by the Rent Controller is sustained. Its reversal by the Appellate Authority is set aside. [*Paras.* 2 *and* 3.]

Cases referred to:

Daya Ram v. *Shyam Sundari* (1966) 1 S.C.J. 6: (1965) 1 S.C.R. 231: A.I.R. 1965 S.C. 1049; *Dalai Mallike* v. *Krushna Chandra*, (1967) 2 S.C.J. 149: A.I.R. 1967 S.C. 49.

Petition under section 25 of the Tamil Nadu Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the II Judge (Appellate Authority) Court of Small Causes, Madras, dated 5th April, 1980 and made in H.R.A No. 609 of 1979 (H.R.C. No. 835 of 1974 dated 18th January, 1979, VI Judge Rent Controller, Court of Small Causes, Madras).

S. Desikan and *V. C. Venkataraman*, for Petitioners.

B. *Kalathinathan*, for Respondent.

*C.R.P. No. 3092 of 1980. 2nd *December*, 1981.

The Court delivered the following

JUDGMENT.—The petitioner's father filed an application under the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960, for the eviction of the respondent on the ground of wilful default. Pending that, he died and thereafter a few of the legal representatives, leaving behind one of the daughters of the deceased, continued the application which resulted in an order of eviction. That was successfully contested before the appellate authority. Hence, against this appellate order setting aside the order of eviction, the present revision has been preferred.

2. The contention of the learned counsel for the petitioners is that in so far as the estate of the deceased has been fully represented by the majority of the legal representives, the application must be held to be maintainable. This is opposed relying on two of the rulings reported in *Daya Ram* v. *Shyam Sundari*[1] and *Dalai Mallike* v. *Krushna Chandra*[2], stating that it is not permissible in law. On a careful consideration of the above argument, I am of the view that inasmuch as the majority of the legal heirs are eager to prosecute the applicatation for eviction, it is not open to the tenant to say that failure to implead one or two of the legal representatives would be fatal to the petition. As a matter of fact in *Daya Ram* v. *Shyam Sundar*[1] it is observed:

> "The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and *bona fide* enquiry ascertains who are the legal representatives of a deceased defendant or respondent and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record."

Again, in *Dalai Mallike* v. *Krushna Chandra*[2], the position is clearly explained at page 51 thus:

> "It has been contended on behalf of the appellants that the principle of these cases applies to the present case and the fact that three of the heirs were left out would make no difference as the entire estate of Dolai deceased must be held to be represented by the widow and the major son who were brought on the record. It will be noticed that there is one difference between the present case and the two cases on which reliance has been placed on behalf of the appellants. This is not a case where a plaintiff or an appellant applies for bringing the heirs of the deceased defendant or respondent on the record; this is a case where one of the appellants died and his heirs have to be brought on record. In such a case there is no question of any diligent or *bona fide* enquiry for the deceased appellant's heirs must be known to the heirs who applied for being brought on the record. Even so we are of opinion that unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record should not be held to represent the entire estate including the interests of the heirs not brought on the record. This is not to say that where heirs of an appellant are to be brought on record all of them should not be brought on record and any of them should be deliberately left out. But if by oversight or on account of some doubt as to who are the heirs, any heir of a deceased appellant, is left out that in itself would be no reason for holding that the entire estate of the deceased is not represented unless circumstances like fraud or collusion to which we have referred to above exist."

3. In view of the latter decision, I see no difficulty in holding that it will be open to the petitioners heirein to continue the application. Hence the order of the appellate authority is set aside and that of the Rent Controller is restored. The civil revision petition is allowed. No costs.

R.S. —— *Petition allowed.*

1. (1966) 1 S.C.J. 6: (1965) 1 S.C.R. 231 : A.I.R. 1965 S.C. 1049.
2. (1967) 2 S.C.J. 149; A.I.R. 1967 S.C. 49.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Balasubrahmanyan, J.*

Indian Bank, Madras .. *Petitioner**

v.

B. D. Kothandapani and others .. *Respondents.*

Limitation Act (XXXVI *of* 1963), *section* 15 (1) — *Applicability—Final decree in mortgage suit passed on* 1*st September*, 1960—*Execution petition filed on* 16*th December*, 1973—*Decree-holder in the meanwhile restrained by order of injunction passed on* 7*th September*, 1965 *in interlocutory proceeding in another suit—Injunction vacated on* 19*th August*, 1969 *with dismissal of that suit—Computing period of limitation—Period during which injunction was in force if to be excluded.*

Section 15 (1) of the Limitation Act provides, *inter alia* that in computing the period of limitation for any application for execution of a decree, the execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn shall be excluded. The proper way to apply this provision is to compute the period of limitation with the time running till the date on which the injunction is issued, for that marks the date on which the running of time will stop. The time will stop running and will remain suspended till the day on which the order of injunction is withdrawn. It is on the day after that, that the time will again begin to run its course. In practical terms, the time during which the injunction is in force is a slice of time which has got to be completely cut out, removed out of reckoning, and excluded in the computation of the twelve year period of limitation prescribed for the filing of the execution petition. The statute does not impose any requirement that on the date on which the limitation would have normally expired, but for the imposition of an injunction, an injunction should actually subsist in order that section 15 (1) might apply. A view to the contrary is not supported either by the plain terms of the section or by the format of similar provisions for excluding certain slices of time in the computation of limitation, which are to be found elsewhere in the Limitation Act. [*Para.* 4.]

* C.R.P. No. 2356 of 1978.

30th September, 1981.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court, Madras (10th Assistant Judge, Madras), dated 12th August, 1977 and made in E. P. No. 66 of 1973, in O. S. No. 1759 1956.

S. B S. Raman for *Aiyar* and *Dolia, G. Venkataraman* and *V. Mani,* for Petitioner.

R. Kothandaraman and *A. Asokan,* for Respondents.

The Court made the following

ORDER.—The question in the revision is whether the application for execution filed by the petitioner was or was not barred by limitation. The decree was a mortgage decree. The final decree was passed on 1st September, 1960. The petition for excuting the decree was filed by the petitioner on 16th December, 1973. It may, however, be observed that the decree-holder was restrained from executing the decree by an order of injunction passed on 7th September, 1965 in an interlocutory proceeding in another suit. That order of injunction was in force till 19th August, 1969, when the injunction stood vacated with the dismissal of the relevant main suit itself.

2. Before the executing Court the decree-holder in the present case submitted that the period during which the injunction in the other suit was in force, namely from 7th September, 1965 to 19th August, 1969, must be excluded in computing the period of limitation of twelve years applicable to the execution petition. The executing Court, however, rejected this plea. The Court observed that the twelve-year time-limit, as computed from the date of the decree, showed that the 1st day for the execution of the decree was on 1st September, 1972. But, on that date, there was no injunction of any Court against the petitioner for executing his decree. It was pointed out that the injunction had already been vacated on 19th August, 1969. In the opinion of the learned Judge, the decree-holder could not seek to exclude the time during which the injunction was in force,

in the events that happened. On this basis, he held that the execution petition was barred by limitation.

3. In this revision, the decree-holder's learned counsel submitted that this view of the Court below on the application of section 15 (1) of the Limitation Act is untenable. I agree with the learned counsel's submission.

4. Section 15 (1) of the Limitation Act provides, *inter alia* that in computing the period of limitation for any application for execution of a decree, the execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn shall be excluded. The proper way to apply this provision is to compute the period of limitation with the time running till the date on which the injunction is issued, for that marks the date on which the running of time will stop. The time will stop running and will remain suspended till the day on which the order of injunction is withdrawn. It is on the day after that, when the time will again begin to run its course. In practical terms, the time during which the injunction is in force is a slice of time which has got to be completely cut out, removed out of reckoning, and excluded in the computation of the twelve year period of limitation prescribed for the filing of the execution petition. The statute does not impose any requirement that on the date on which the limitation would have normally expired, but for the imposition of an injunction, an injunction should actually subsist, in order that section 13 (1) might apply. The view of the learned Judge to the contrary is not supported either by the plain terms of the section or by the format of similar provisions for excluding certain slice of time in the computation of limitation, which are to be found elsewhere in the Limitation Act.

5. I did not hear any arguments from learned counsel for the respondents based either on the wording of the section or supported by any case-law to the opposite effect. The revision is accordingly allowed. The order of the executing Court is vacated. The Court is directed to dispose of the execution petition on merits. In the peculiar circumstances of this case, there will be no order as to costs.

R. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Sethuraman, JJ.*

Chainraj Ramchand, registered Partnership firm of Bankers by Partner Ramchand Lakhraj .. *Appellant**

v.

V. S. Narayanaswamy and others .. *Respondents.*

Indian Partnership Act (IX of 1932), section 19 (2)—Suit for recovery of money—Partner of a firm—No implied authority to compromise or relinquish any claim or portion of a claim by the firm or to withdraw suit or proceeding filed on behalf of the firm.

Section 19 (2) of the Indian Partnership Act, 1932 clearly laid down that in the absence of any usage or custom of trade to the contrary, the implied authority of a partner did not empower him to compromise on relinquish any claim or portion of a claim by the firm or to withdraw a suit or proceeding filed on behalf of the firm. This section made it clear that unless there was an express authority given to a partner by all the partners, that partner could not compromise the claim or withdraw a suit. To file a suit and to conduct the same on behalf of the firm, no express authority was necessary. [*Para.* 7.]

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 31st January, 1973 and made in I.A. No. 131 of 1971 in O.S. No. 672 of 1968.

N. Varadarajan, for Appellant.

G. M. Nathan, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—This appeal filed by the plaintiff in O.S. No. 672 of 1978 on the file

*A.A.O. No. 333 of 1977.

31*st August,* 1981.

of Sub-Court, Coimbatore, is directed against the order, dated 31st January, 1972 in I.A. No. 131 of 1971 of the Court below recording a compromise under Order 23, rule 3 of the Code of Civil Procedure at the instance of the defendants.

2. The said suit, O.S. No. 672 of 1968, was filed by the plaintiff for recovery of a sum of Rs. 22,158-50 said to be owing from the defendants. While the said suit was pending, the defendants filed I.A. No. 131 of 1971 for recording a compromise said to have been entered into between the plaintiff and the defendants. Under the compromise, the plaintiff is said to have received a sum of Rs. 1,000 and had agreed to receive the balance of Rs. 4,000 in full settlement of the claim as against the defendants. The plaintiff resisted the said application contending that there was no compromise of the suit claim, that the compromise said to have been entered into by one Mohanlal Chainraj who was not a partner of the plaintiff firm was not binding on the plaintiff as he had no authority to represent the firm, and that in fact though there was a compromise between Mohanlal Chainraj and the defendants with reference to the amounts due to him in respect of the claims in O.S. No. 343 of 1968, the suit claim was not compromised at all.

3. In support of the defendants' case that there was a compromise between the parties in respect of the suit claim, they have filed Exhibits A-1 to A-12 and examined P.Ws. 1 and 2, while the plaintiff has filed Exhibit B-1 and examined R.W. 1. The trial Court held that as Mohanlal Chainraj has been authorised to act on behalf of the firm he had the requisite authority to compromise, and that the fact that admittedly there was a compromise in the other suit, O.S. No. 343 of 1968 on the file of Sub-Court, Coimbatore, at the instance of Mohanlal Chainraj, the compromise set up by the defendants in this case should also be true. In this view, the trial Court recorded the compromise under Order 23, rule 3 of the Code of Civil Procedure. The plaintiff firm has challenged the finding of the trial Court that there has been a compromise between the parties in relation to the suit claim and that the said compromise was legally valid.

4. According to the learned counsel for the appellant there has, in fact, been no compromise in relation to the suit claim either at the instance of Mohanlal Chainraj or at the instance of P.W. 2, Jagadish Chainraj, who is admittedly a partner of the plaintiff firm, and that even if there had been any such compromise the same will not bind the firm as the person, who is said to have compromised the matter, did not have the requisite authority to do so. In this case, the trial Court seems to have proceeded mainly on the evidence of P.W. 2, who admits having received originally a sum of Rs. 1,000 and later, after the filing of the application, I.A. No. 131 of 1971 out of which this appeal arises, a sum of Rs. 4,000 as per the terms of the compromise said to have been entered into between the plaintiff and the defendants. In accepting the evidence of P.W. 2, Jagadish Chainraj, the trial Court has completely overlooked an obvious fact, which will go to show that P.W. 2 is not speaking the truth. The counter-statement in I.A. No. 131 of 1971 on behalf of the plaintiff-firm was filed by P.W. 2 and in that counter-statement he had clearly stated that there was no compromise of the suit claim either on 26th December, 1969 or on any other date, and that the plaintiff firm or any of its partners did not take part in any compromise talks and that Mohanlal Chainraj did not agree to compromise the suit claim on behalf of the plaintiff. Thus, the stand taken by P.W. 2 at the stage of the filing of the counter-statement on behalf of the plaintiff firm, is that there was no compromise of the suit claim at any time either at the instance of any of the partners or at the instance of Mohanlal Chainraj. Nearly two years after filing the said counter-statement denying the truth of the compromise pleaded by the defendants and contending that even if the compromise is true the same is not legally valid and binding on the plaintiff, Jagadish Chainraj has come forward now, at the stage of the trial, as P.W. 2 and has stated that at the instance of Mohanlal Chainraj he agreed to the compromise and in fact received a sum of Rs. 1,000 originally and later the balance of Rs. 4,000. In this state of affairs, the evidence of P.W. 2 cannot at all be accepted as true. P.W. 2 after filing the counter-statement denying the truth and validity of the compromise, cannot receive the amount from the defendants and say that the receipt of the

amount is on behalf of the plaintiff firm. The trial Court is, therefore, in error in accepting the evidence of P.W. 2 to the effect that he agreed to the compromise, especially in the face of his earlier counter-statement, wherein he had stated that there was actually no compromise at all and no partner had the authority to compromise. If P.W. 2's evidence is eschewed as being inconsistent with the counter-statement filed by him earlier in I.A. No. 131 of 1971, then we have only the evidence of P.W. 1, who is said to be a relation of the defendants. According to him, the compromise was entered into between the plaintiff and the defendants at the instance of Mohanlal Chainraj in the course of the settlement of the other disputes between Mohanlal Chainraj and the defendants. Even assuming that Mohanlal Chainraj, while compromising all his claims as against the defendants, agreed for the settlement of the plaintiff's claim as against the defendants at Rs. 5,000, the said compromise cannot be taken to bind the plaintiff firm. P.W. 1 has also deposed that P.W. 2 took part in the compromise talks and ultimately he received the entire sum of Rs. 5,000 in pursuance of the said compromise. Even assuming that P.W. 1's evidence is true on this aspect, the question will arise whether Jagadish Chainraj, P.W. 2 had the requisite authority to compromise the suit claim on behalf of the firm. The trial Court has proceeded on the basis that since P.W. 2 as a partner had sufficient authority to represent the firm, he should be taken to have the requisite authority to compromise. It has also taken the view that P.W. 2 has been conducting the suit and, therefore, himself and Mohanlal should be taken to have the requisite authority to compromise the suit with the defendants in respect of the claim as against the defendants.

5. The two questions, therefore, that arise for consideration in this appeal are:—

1. whether P.W. 2 or Mohanlal Chainraj had any authority to compromise the suit claim as against the defendants?

2. whether the compromise effected by any of them will bind the plaintiff firm?

6. On the first question, we find from the materials on record that Mohanlal Chainraj has filed the suit, O.S. No. 343 of 1968 on the file of Sub-Court, Coimbatore as against the same defendants claiming a sum of Rs. 35,000. There was also another claim as against them outstanding in favour of Mohanlal Chainraj. The defendants' case is that while settling those disputes between Mohanlal Chainraj and the defendants, the plaintiff's suit has also been settled at his instance. The fact that Mohanlal Chainraj has settled his disputes with the defendants is not in dispute, and the dispute is only with regard to the alleged settlement of the plaintiff's claim as against the defendants covered by the suit, O.S. No. 672 of 1968. The mere fact that the two other claims as against the defendants have been settled between the defendants and the claimant, Mohanlal Chainraj, will not automatically lead to the inference that the plaintiff's claim as against the defendants had also been settled. As a matter of fact, the settlement effected between Mohanlal Chainraj and the defendants in O.S. No. 343 of 1968 has been reduced to writing and that has been marked as Exhibit A-6 in this case. There is no such deed recording the settlement so far as the plaintiff's suit claim is concerned before the filing of the application to record the compromise. The settlement is said to have been effected orally on the plaintiff receiving a sum of Rs. 1,000 at the first instance and agreeing to receive the balance of Rs. 4,000 later. Mohanlal Chainraj, who is said to have effected the compromise of the suit, has not been examined. Though certain letters written by Mohanlal Chainraj to the defendants claiming the amounts due to the plaintiff firm have been relied on by the defendants to show that Mohanlal Chainraj was authorised to settle the claim on behalf of the defendants, we do not see how the letters written by Mohanlal Chainraj demanding the amounts due to the plaintiff will enable him to compromise the suit claim. On the materials, therefore, we are clearly of the view that Mohanlal Chainraj had no authority to compromise the suit claim on behalf of the plaintiff firm. Similarly, the evidence on record does not disclose any authority on the part of P.W. 2 to settle the suit claim. The trial Court refers to the fact that P.W. 2, is a partner of the firm and is the person who is conducting the suit and, therefore, when he comes and says that the suit has been settled it should be taken as true. But as already pointed out, P.W. 2 has himself denied the truth of the compromise and he has categorically stated in the

counter-statement filed by him in I.A. No. 131 of 1971, that there was no compromise at any time. Having categorically denied the factum of the compromise, he has chosen to come as a defendants' witness and depose that there was a compromise and that he has received a sum of Rs. 1,000 in pursuance of the compromise at the first instance and the balance after the filing of I.A. No. 131 of 1971. The evidence on record, indicates that there is a faction between the partners in the plaintiff firm after the filing of the suit and that P.W. 2 has chosen to collect the sum of Rs. 5,000 from the defendants as representing one faction to the prejudice of the other faction. If really there was a compromise the parties would have entered into a deed of compromise then and there as has been done in Exhibit A-6 with reference to the Mohanlal Chainraj's claims as against the defendants in O.S. No. 343 of 1968. Though there is such a deed of settlement signed by P.W. 2 and one J. C. Nichani, who was not a partner at a later point of time, having regard to the fact that the said deed came into existence only on 15th December, 1971, long after the filing of I.A. No. 131 of 1971, that deed cannot support the defendants' plea that there was a concluded compromise even earlier. We have, therefore, no hesitation in holding that there was no compromise entered into between the plaintiff and the defendants before the filing of I.A. No. 131 of 1971. One peculiar feature of Exhibit A-3 is that it proceeds on the basis that the compromise was effected on 15th December, 1971, and not on any earlier date. It does not refer to any earlier arrangement under which the suit claim has been settled. If really there was a settlement arrived at earlier as regards the plaintiff's suit claim, one would expect a recital to that effect in Exhibit A-8. Exhibit A-8 shows that P.W. 2 entered into compromise with the defendants only on 15th December, 1971 and not earlier. But the petition, I.A. No. 131 of 1971 for recording the compromise has been filed even on 18th February, 1971.. Therefore, as on 18th February, 1971, there was no compromise established by the defendants. The question is whether such a compromise entered into by P.W. 2 either before or after the filing of I.A. No. 131 of 1971 can be valid in law,

7. Section 19 (2) of the Indian Partnership Act, 1932, clearly lays down that in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to compromise or relinquish any claim or portion of a claim by the firm or to withdraw a suit or proceeding filed on behalf of the firm. This section makes it clear that unless there is an express authority given to a partner by all the partners, that partner cannot compromise the claim or withdraw a suit. The trial Court has assumed a power on the part of P.W. 2 to compromise merely because he was attending to the suit filed by the plaintiff firm. To file a suit and to conduct the same on behalf of the firm, no express authority is necessary. Therefore, the trial Court is in error in assuming an authority express or implied on the part of P.W. 2 to compromise the matter, merely because he had been conducting the suit on behalf of the plaintiff, or had been claiming the suit amount from the defendants even before the filing of the suit. The trial Court has not anywhere said in its judgment that P.W. 2 had an express authority to compromise the suit claim on behalf of the other partners. Though it has said that P.W. 2 entered into a compromise with the consent of all the partners, it has not referred to any materials, which would indicate that there has been any implied or express consent given by the other partners to compromise the suit. In this view of the matter, we are not inclined to accept the view taken by the trial Court.

8. The civil miscellaneous appeal is, therefore, allowed and the order of the trial Court is set aside. The application, I.A. No. 131 of 1971, filed by the defendants will stand dismissed. The result is the suit will have to proceed to trial on merits. No order as to costs in the appeal.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*V. Ramaswami and R. Sengottuvelan, JJ.*

T. S. Kannan .. *Appellant**

v.

The High Court of Judicature of Tamil Nadu High Court Buildings represented by the Registrar and another

.. *Respondents.*

Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, rule 16—Assistant Public Prosecutor Grade II in Tamil Nadu Government Service — Appointed temporary Judicial Second Class Magistrate on recruitment by transfer—Complaints received against him by High Court—Detailed enquiry ordered—Pending enquiry reverted to parent department — Enquiry completed by Vigilance Cell and report received by High Court — High Court directing a departmental enquiry by a District and Sessions Judge—Preliminary objection to the departmental enquiry by High Court on the ground he had been reverted to the parent department—Objection overruled by the disciplinary authority—Writ petition dismissed—Appeal—Court held to have jurisdiction to institute disciplinary proceedings—Constitution of India (1950), *Article* 226.

K was initially appointed as Assistant Public Prosecutor Grade II by Tamil Nadu Government in July, 1965, Later, he was appointed as temporary Judicial Second Class Magistrate, on his recruitment by transfer. Certain complaints were received against him and a secret probe was made by the Vigilance Cell of the High Court. A detailed enquiry was then directed. Pending enquiry, *K* was reverted back to his parent, department. The detailed enquiry by the Vigilance Cell was completed and was received by the High Court. The High Court directed a departmental enquiry to be conducted by the District and Sessions Judge of South Arcot at Cuddalore. At this stage *K* raised a preliminary objection that the High Court had no jurisdiction to conduct the departmental enquiry as he had been reverted to his parent department. This objection was overruled by the disciplinary authority. *K* filed a writ petition which was dismissed. On appeal by *K* contending that the High Court had no jurisdiction to conduct the departmental enquiry,

Held: On the basis of the rules relating to disciplinary proceedings in the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, the High Court also had jurisdiction to initiate disciplinary proceedings, hold an enquiry and give a finding even in respect of a person who had already been reverted to the parent Department provided the allegations were in respect of his work and conduct before such reversion.

[*Para.* 5.]

Appeal under clause 15 of the Letters Patent against the Order of Mr. Justice Nainar Sundaram, dated 8th January, 1981 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1635 of 1977 presented under Article 226 of the Constitution of India to issue a writ of prohibition prohibiting the 2nd respondent from proceeding with the departmental enquiry relating to the case con. No. 1 of 1976 on his file in pursuance of the orders of the High Court in the administrative side in proceeding Roc. No. 118 of 1974 V.C., dated 3rd January, 1976 and 25th April, 1976 and concerning the petitioner herein.

S. Balasubramanian, for Appellant.

K. Govindarajan for Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—The appellant was initially appointed as Assistant Public Prosecutor Grade-II, Chingleput District, in July, 1965, and later regularised by the Government in G.O. Ms. No. 3746, Home, dated 27th December, 1968. He was appointed as a temporary Judicial Second Class Magistrae, on his recruitment by transfer as provided under rule 5 read with rule 13 of the Tamil Nadu State Magisterial Service Rules, and he was posted to Gingee in the High Court's proceedings, dated 21st December, 1973. On receipt of certain complaints against him when he

*W.A. No. 72 of 1981.

10*th August,* 1981.

was serving as Judicial Second Class Magistrate, Gingee, a secret probe was made by the Vigilance Cell, of the High Court. In the meanwhile, he was transferred on 21st June, 1974 to Triuva...... in Ramnad District. A detailed enquiry was then directed on the allegations of corruption and corrupt practices and while such enquiry was pending, the appellant was reverted back to his parent department and this was notified by the High Court on 29th April, 1975. The detailed enquiry by the Vigilance Cell was completed and the report of the Vigilance Cell was received by the High Court on 18th September, 1975. During such detailed enquiry, 32 witnesses were enquired by the Special Officer, Vigilance Cell and their statements were recorded on 16 specific instances of corruption and corrupt practices alleged against the appellant and one Sheik Hyder, Copyist in the Judicial Second Magistrate's Court, Gingee, who is the fourth respondent in the writ petition. The High Court, after consideration of the report and other evidence, by an order dated 3rd January, 1976, directed a departmental enquiry to be conducted by the District and Sessions Judge of South Arcot at Cuddalore, and he was asked to submit his findings. On 9th August, 1976, the Enquiring Officer framed as many as 24 charges against the appellant and called upon him to submit his written explanation. He was also required to fill up the questionaire form enclosed therewith and send it along with his written statement. At that stage, the appellant filed a petition before the Registrar of this Court raising a preliminary objection to the departmental enquiry ordered by the High Court on the ground that since he had been reverted to his parent department and posted as Assistant Public Prosecutor Grade II, Poonamallee, he was no longer in the service as Judicial Second Class Magistrate and the High Court or the District Judge of South Arcot, who is directed to enquire into the matter, has no jurisdiction to enquire into the alleged corruption and corrupt practices. In this preliminary objection petition he has also raised two other contentions as preliminary objection itself, one to the maintainability of the proceedings on the ground that the High Court had already waived its jurisdiction, if any by the order of reversion to his parent department, and also that a joint enquiry along with his copyist could not be held, This objection petition was sent to the District Judge of South Arcot, who was holding the departmental enquiry, for disposal. The preliminary objection was overruled by the disciplinary authority on the ground that the High Court had directed him only to enquire and submit his finding to the High Court and that therefore, the appellant was required to submit his written statement. He was also informed that if he does not submit his written statement, it will be presumed that he had no defence to offer against the charges and further proceedings will follow. At this stage, the appellant filed W.P. No. 1635 of 1977 in this Court praying for the issue of a writ of prohibition prohibiting the enquiring officer from proceeding with the departmental enquiry relating to his case and concerning the appellant. This writ petition was dismissed by a learned Single Judge observing that:

> "The question as to whether the enquiry could be conducted by the borrowing authority through the second respondent can as well be agitated and gone into in the course of the enquiry itself before the second respondent".

and that therefore, there was no necessity to issue a writ of prohibition prayed for. Obviously, the learned Judge overlooked the fact that already the departmental Enquiring Officer had overruled his preliminary objection and it is probably for those reasons this writ appeal has been admitted by the First Bench. Even so, we are unable to agree with the learned counsel for the appellant that the High Court had no jurisdiction to direct an enquiry into the allegations on the ground that the appellant had been reverted to his parent department. We have already referred to the fact that the appellant was recruited as a Judicial Second Class Magistrate under rule 5 read with rule 13 of the Tamil Nadu State Magistrate Service Rules and the method of recruitment was "recruitment by transfer". The appointing authority in such cases is the Government under rule 32 of these Rules, the Tamil Nadu Civil Services (Classification Control and Appeal) Rules, hereinafter called Rules, were made applicable to all the Judicial Second Class Magistrates recruited by transfer as well.

2. The learned counsel for the appellant relied strongly on rule 16 of the Rules in

support of his contention that the rules contemplate an enquiry by the borrowing authority only during the period when a delinquent was in their service and once he is reverted to his parent department, the borrowing authority, shall have no power either to enquire or impose any punishment. Rule 16 of the Rules as it originally stood at the relevant time, reads as follows:—

"16. *Where a person to be punished has been lent to the punishing authority.*— (*i*) the power to impose the penalty of compulsory retirement or removal or dismissal, shall not lie with any authority other than the lending authority; the borrowing authority shall in a case where it considers that the punishment of compulsory retirement, removal or dismissal should be imposed, complete the enquiry and revert the person concerned to the lending authority for such action as that authority may consider necessary:

Provided that the provision in this clause requiring the reversion of the person concerned to the lending authority shall not apply where the person has been lent by one department to another and both the departments are under the same administrative authority; and

(*ii*) Unless in any case it be otherwise provided by specific orders by the Governor of Tamil Nadu the punishing authority shall consult the lending authority before imposing any lesser penalty and in the case of suspension shall report forthwith to the lending authority the circumstances lending to the imposition of that penalty".

The *Explanation* to this section, which is unnecessary is omitted.

3. It may be seen from a reading of this rule that the words "punishing authority" referred to in the beginning of this rule is the borrowing authority or the High Court in this case. Rule 16 as such deals with the power to impose the penalties referred to therein. If the penalty to be imposed is one of the major penalties, *viz.*, compulsory retirement, removal or dismissal, the power to impose such penalty shall lie only on the lending authority *viz.*, the Government in this case. If the borrowing authority considers that the major punishment is called for, after completion of the enquiry, the person concerned shall be reverted to the lending authority for such action as that authority may consider necessary. But, in the case of punishments other than major punishments, the borrowing authority itself can impose those punishments, the only limitation being that the lending authority should be consulted before imposing any such penalty. What is relevant in this connection is that rule 16 itself contemplates that the disciplinary authority in such cases is the borrowing authority. Only if any of the major punishments is called for, the borrowing authority was required to complete the enquiry and revert the person concerned to the lending authority for such action as that authority may deem necessary.

4. The learned counsel for the appellant, however, contended that the fact that clause 1 of rule 16 requires a borrowing authority in cases where the major punishments are to be imposed, to complete the enquiry and revert the person concerned to the lending authority shows that the enquiry itself should have been completed before such revision is made and if once a reversion had already taken place no enquiry either could be initiated with reference to any misconduct committed during the peroid before reversion nor an enquiry, even if it had already been initiated could be completed if once a reversion had taken place. We are unable to agree with this contention of the learned counsel for the appellant. It is true, clause 1 of rule 16 refers to completion of enquiry and reversion. The word "complete the enquiry and revert the person concerned" in clause 1 of rule 16 need not necessarily be understood conjunctively and the 'and' having regard to the context in our opinion could read as 'or'. This is specially for the reason that rule 16 will have to be understood and interpreted in the light of other rules relating to disciplinary proceedings. Rule 8 refers to the penalties that may be imposed for good and sufficient reason. Rule 9 (*c*) (1) states that the Governor or any other authority empowered by him by general or special order may: (*i*) institute disciplinary proceedings against any Government servant; (*ii*) direct a disciplinary authority to institute disciplinary proceedings against any Government servant on whom that dis-

ciplinary authority is competent to impose under these rules any of the penalties specified in rule 11. Rule 11 (*a*) deals with the authorities competent to impose punishments. In the case of members of the Tamil Nadu State Judicial Service and the Tamil Nadu State Magisterial Service, the authority competent to impose the penalties specified in items (*i*), (*iii*), (*iv*), (*v*) and (*ix*) in rule 8 shall be the High Court. Rule 15, which is another relevant provision, may be fully extracted and that reads as follows:—

> "15 (*a*) Where, on promotion or transfer, a member of a service in a class, category or grade is holding an appointment in another class, category or grade thereof or in another service state subordinate service, no penalty shall be imposed upon him to respect of his work or conduct before such promotion or transfer except by an authority competent to impose, the penalty upon a member of the service in the latter class, category, grade or service as the case may be.
>
> (*b*) Where a person has been reverted or reduced from a State to a Subordinate Service, or from one service to another, or from one class, category or Grade of a service to another class category or grade thereof, to penalty shall be imposed upon him in respect of his work or conduct while he was a member of the service, class, category or grade, as the case may be, from which he was reverted or reduced except by an authority competent to impose the penalty upon a member of such service, class, category or grade, as the case may be".

5. As per this rule, no penalty can be imposed upon a person recruited by transfer in respect of his work or conduct before such transfer except by the parent department. Even in the case of a reversion, the borrowing authority shall have no power to impose the penalties even in respect of his work and conduct while he was in the service of the borrowing authority. On the basis of these rules, though it is possible to argue that the penalty as such cannot be imposed except by the authorities mentioned in rules 15 and 16, in view of the case of recruitment by transfer, the borrowing authority is also authorised to institute disciplinary proceedings, we have to hold that the High Court also has got jurisdiction to initiate disciplinary proceedings, hold an enquiry and give a finding ing even in respect of a person who has already been reverted provided the allegations were in respect of his work and conduct before such reversion. In fact, the High Court has directed the Enquiring Officer to hold the departmental enquiry and submit his findings to the High Court in so far as the appellant is concerned. The decision of this Court by Koshal, J., as he then was, in W.P. No. 3118 of 1972 related to a case of authority of the borrowing department to impose penalties after the concerned officer was reverted and it did not relate to the question of jurisdiction of the borrowing authority to hold the enquiry itself. Therefore, that decision is not applicable.

6. In the result, the writ appeal is dismissed though for different reasons than that mentioned by the learned Single Judge. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. N. Singaravelu, J.*

Sha Nirbhayala Bahadurmal .. *Petitioner**

v.

Krishna Rao M. Nikan .. *Respondent.*

and

Krishna Rao M Nikan .. *Petitioner*

v.

Sha Nirbhayala Bahadurmal and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10 (3) (iii)—Petition for eviction on the ground of waste and for owner's occupation—Improvements made by tenant like changing the shutters and doors with rolling shutters and removal of cement flooring and putting up Mosaic flooring all in the nature of remodelling, whether would amount to acts of waste so as to impair the value or utility of the building.

The landlord filed a petition for eviction of the tenant on the ground of commission of acts of waste, conversion of the building for different uses and for owner's occupation. The Rent Controller as well as the Appellate Authority ordered eviction. The tenants filed a revision petition to revise the orders of the authorities.

Held: Changing the nature of the demised premises tantamounts to technical waste and the demolition or removal of the doors and shutters, pillars, etc., are undoubtedly wilful and reckless acts on the part of the tenant. It is not as if the removal of these portions was caused in the course of reasonable use and it is certainly prejudicial to the interests of the landlord in that the tenant has made indiscriminate alterations and addition unilaterally without the consent and approval of the landlord. This also amounts to doing of an act which affects the utility of the building though the tenant might have added to the value of the building by putting up a better appearance. [*Para.* 6.]

*C.R.P. Nos. 2170 and 2821 of 1980.
5th January, 1982.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973 praying the High Court to revise the order of the Court of the II Judge, Court of Small Causes, Madras, dated 28th June, 1980 and made in H.R.A. Nos. 882 and 1070 of 1979 (H.R.C. No. 769 of 1977, VII Judge, Court of Small Causes, Madras).

Habibulla Badsha and *T. P. Sankaran,* for Petitioner.

M. I. Meeran Sahib, for Respondent.

The Court delivered the following

JUDGMENT.—These are two revision petitions, one by the landlord and another by one of the tenants (first respondent before the Rent Controller) against the common judgment passed by the Appellate Authority. For the sake of convenience, the term 'petitioner' hereinafter refers to the landlord and the term 'respondent', wherever it occurs will mean the tenant Shah Nirbhayalal Bahadurmal (first respondent before the Rent Controller).

2. The petitioner-landlord filed the petition for eviction of three tenants on the ground of commission of acts of waste by the respondent, conversion of the building for different user by the respondent and requirement for owner's occupation. The tenants denied all the grounds and the Rent Controller found that the tenant has committed acts of waste, but rejected the other two grounds, namely, conversion by the tenant and requirement for own occupation. Consequently, eviction was ordered. The respondent and the landlord preferred appeals before the Appellate Authority against the respective adverse findings and the Appellate Authority dismissed both the appeals confirming the order of eviction of the respondent-tenant (Shah Nirbhayalal Bahadurmal) alone. Hence these two revision petitions, C.R.P. No. 2821 of 1980 by the landlord and C.R.P. No. 2170 of 1980 by the respondent-tenant.

3. The building in question is situated at N. S. C. Bose Road, Madras and, according

to the landlord, the tenant has demolished portions of the premises and removed the doors and fixed some shutters without the consent or approval of the landlord. Thus, it is stated that the tenant has committed acts of waste. The other two grounds put forward by the landlord are that the tenant has put the building to a different use in that it was originally let out for carrying on business in stainless steel, but that the tenant is doing textile business and for requirement for own occupation. So far as the alleged conversion is concerned, there is absolutely no merit in the case of the landlord, since, the purpose for which the building was leased out was only for carrying on business, that is to say, for non-residential purpose. It is immaterial whether the tenant sells stainless steel articles or textile goods. Both the Courts below found that there is no evidence that there was a contract to do business only in stainless steel goods. Therefore, there is no difficulty in rejecting this ground of eviction.

4. The other ground of eviction is requirement for own occupation. Hereagain, both the Courts below found that the landlord has not made out a case. Even in the petition for eviction, the landlord vaguely stated that he desires to start a business in textile goods in the city of Madras and therefore, requires the premises for that purpose. It is important to note that it is not even disclosed in his petition what business he proposed to start in Madras City. Admittedly, the landlord is a businessman permanently residing at Kancheepuram and he is not carrying on any business at Madras. Even in his notice under Exhibit P-1, the landlord has not mentioned about his alleged requirement of the demised premises for carrying on his business. The Rent Controller has pointed out that the case of the landlord itself was very half-hearted in this respect. Though the eviction petition was prepared and signed by the landlord even as early as on 1st September, 1976, it was actually presented before the Court only on 15th February, 1977 after a lapse of 5½ months. Even then, he had not made any preparation for the commencement of the business at Madras. Of course, he has produced some documents, Exhibits P-4 to P-6 and P-15 to show that he is taking steps to start a business, but those documents were rightly rejected since they came into existence long after the filing of the petition in this case. The Rent Controller also found that the landlord was doing only commission business in handloom goods at Kancheepuram and that there was no purchase or sale as such. Consequently, it was found that the requirement for starting a shop at Madras was not *bona fide*. I do not see any reason to interefere with the concurrent findings of the lower Courts which appear to be just and proper.

5. There remains the third ground, namely, commission of acts of waste by the respondent, Shah Nirbhayalal Bahadurmal (first respondent before the Rent Controller). Both the Courts below have found that the tenant has committed acts of waste and therefore, liable to be evicted on this ground. Learned counsel for the respondent-tenant argued that what all the tenant had done are only in the nature of improvements to the building and certainly they do not constitute waste. It was argued that the tenant merely changed the shutters and the doors as well as the flooring and that they were not likely to impair the value or utility of the building. According to the averments in paragraph 4 of the petition for eviction, the tenant had demolished certain portions of the building, removed some doors and doorframes and pillars, and for the purpose of running the textile business, he has remodelled the building without the consent or the approval of the landlord. This, according to the landlord, amounts to commission of acts of waste since portions of the building have been removed and reconstructed. The tenant gave evidence as R.W. 1 and admitted that they were carrying on stainless steel business till 1975 and in that year, they wanted to start a textile business and therefore, remodelled the building for the purpose of a show-room. R.W. 1 has categorically admitted that the two pillars which were in the centre of the building measuring 6½' x 3" x 3" were removed by him. He further admitted that the two teakwood doors in front were removed and he had put up rolling shutters. Formerly, there was cement flooring and that has been removed and mosaic flooring has been put up. R.W. 1 conceded that he had not obtained the consent of the petitioner for these alterations. It was elicited that the shutters are 9' x 6'. Placing reliance on these admissions, both the Courts below found that these alterations done uni-

laterally by the tenant for the purpose of a show-room without the consent of the landlord amount to commission of acts of waste.

6. Learned counsel for the tenant argued that these alterations or constructions have not impaired the value or the utility of the building and therefore, cannot constitute waste. I am unable to differ from the conclusions of the lower Courts on this aspect. It is not open to a tenant to reconstruct or remodel the building leased out to him without the written consent of the landlord and it is not as if that these admitted acts done by the tenant are mere minor alterations or repair works. They are in the nature of re-modelling and reconstruction to suit the personal requirement of the tenant, who had converted a stainless steel shop into a textile show-room. He should not have ventured on reconstructions and alterations without the approval of the landlord. Changing the nature of the demised premises tantamounts to technical waste and the demolition or removal of the doors and shutters, pillars, etc., are undoubtedly wilful and reckless on the part of the tenant. It is not as if the removal of these portions was caused in the course of reasonable user and it is certainly prejudicial to the interests of the landlord, in that the tenant has made indiscriminate alterations and additions. In my opinion, this also amounts to doing of an act which affects the utility of the building, though the tenant might have added to the value of the building by putting up a better appearance. In this view of the matter, the findings of the Courts below that the tenant should be held to have committed 'acts of waste' coming under the definition have to be upheld. The tenant has obviously made these unauthorised constructions at his own risk and therefore, exposed himself for eviction under this ground. Hence, the findings of the Courts below on this ground are confirmed.

7. In the result, both the civil revision petitions are dismissed. No costs. Time to vacate by the tenant Shah Nirbayalal Bahadurmal, three months from to-day.

R.B. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

Ragubathy Paul Roslan .. *Petitioner**

v.

The Under Secretary, Education Ministry of External Affairs (Students Cell), New Delhi and another .. *Respondents.*

Education—Admission to Regional Engineering College—Information Bulletin issued by Regional Engineering College, Tiruchirapalli in May, 1981, *clauses* 3, 4—*Construction —Malaysian citizen—Passed Higher Secondary Examination conducted by the Department of Government Examinations, Madras — Application to Government of India for admission in the Regional Engineering College, Tiruchirapalli—Ministry of External Affairs nominating the applicant for admission in the Regional Engineering College, Tiruchirapalli — Application rejected by Principal, Regional Engineering College, on the ground the candidate had passed the qualifying examination in India —Writ of* mandamus *issued—Candidate held entitled to admission as a foreign student—Constitution of India* (1950), *Article* 226.

The petitioner was a Malaysian citizen holding a Malaysian passport. He passed the Higher Secondary Examination conducted by the Department of Government Examinations, Madras. Thereafter, the petitioner applied to the Government of India for admission to the Regional Engineering College, Tiruchirapalli as a self-financing foreign student for one of the seats reserved for foreign students. The Ministry of External Affairs, Government of India nominated the petitioner as a candidate for admission in the quota reserved for foreign students in the Regional Engineering College, Tiruchirapalli. The petitioner accepted the nomination and reported to the Registrar of the Regional Engineering College, Tiruchirapalli. After sometime, the petitioner was informed by the Registrar that his application was rejected on the ground that he had

*W.P. No. 9922 of 1981.
4th December, 1981.

passed the qualifying examination in India and that only those who had passed the qualifying examination in a foreign country were eligible for selection. The petitioner sought the issue of a writ of *mandamus* to the 2nd respondent to admit him in the Regional Engineering College, Tiruchirapalli. The second respondent contended that since the petitioner had passed the qualifying examination in India he could not claim a seat in the quota reserved for foreign students and further having passed the qualifying examination in a school at Madras the petitioner could not claim a seat in the Regional Engineering College, Tiruchirapalli within the quota of 50% allotted to other States.

Held: Foreign students staying in India were also entitled to apply as foreign students under the quota reserved for foreign students. [*Para*. 4.]

Clause 3 of the Information Bulletin issued by the Regional Engineering College, Tiruchirapalli which fixed the domicile of a candidate with reference to the School or College in which the candidate had studied only applied for determining the question as to within which quota the candidate could claim admission, namely the State quota of 50% or outside it and it served no other purpose. Hence clause 4 having specifically stated that foreign students could claim a seat only under the quota reserved for other States, the petitioner's domicile was not relevant. [*Para*. 5.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* calling for the records of the 1st respondent in AA1|3270|37|81, dated 23rd July, 1981, 25th September, 1981 and directing the respondents to admit the petitioner in the Chemical Engineering Course in the Regional Engineering College, Tiruchirapalli for the academic session 1981 to 1982.

R. Arunagirinathan of *Raj* and *Raj*, for Petitioner.

K. N. Balasubramaniam, Senior Central Government Standing Counsel and *N. R. Chandran*, Additional Government Pleader No. II, for Respondents.

The Court made the following

ORDER.—The petitioner herein is a Malaysian citizen holding a Malaysian passport. He had passed the Malaysian Certificate of education at Kualalampur. Thereafter he joined the second year of the Higher Secondary course in St. Bede's Higher Secondary School, Madras and passed the Higher Secondary Examination conducted by the Department of Government Examinations, Madras. Thereafter the petitioner applied to the Government of India for admission in the Regional Engineering College, Tiruchirapalli as a self-financing foreign student for one of the seats reserved for foreign students in the Engineering College in India at the undergraduate level. The Ministry of External Affairs, Government of India which is to nominate candidates for the seats reserved for foreign students in the various Colleges in India nominated the petitioner on 23rd July, 1981 as a candidate for admission in the quota reserved for foreign students in the Regional Engineering College, Tiruchirapalli after scrutinising all such applications. The petitioner accepted the nomination and reported to the Registrar of the Regional Engineering College within a week from the date of his nomination. However, the Registrar asked the petitioner to come after a week as the Principal was not then in station. When the petitioner went to the College after a week, the Principal told him that he will be informed later as to when he should join the College. Again when the petitioner contacted the Registrar he was told that his application has been rejected on the ground that he had passed the qualifying examination in India and that only those who had passed the qualifying examination in a foreign country are eligible for selection. He was also told that his application has been sent back to the first respondent on the ground that the petitioner did not have the qualifying examination in a foreign country. The petitioner has, therefore, approached this Court for the issue of a writ of *mandamus* directing the second respondent to admit the petitioner in the Regional Engineering College, Tiruchirapalli for the academic year, 1981-82 in pursuance of the nomination made by the first respondent.

2. The learned Government Pleader appearing for the second respondent has justified his action in not admitting the petitioner as

against reserved seats for foreign students on the basis of the selection made by the first respondent on two grounds: (1) That the petitioner having passed the qualifying examination in India he cannot claim a seat in the quota reserved for foreign students; and (2) that even if the petitioner can claim a seat as against the quota reserved for foreign students, as the petitioner has passed the qualifying examination in a school at Madras, he should be taken to have a domicile in Madras and as such he cannot claim a seat in the Regional Engineering College, Tiruchirapalli within the quota of 50% allotted to other States and that he has to seek admission in the Regional Engineering Colleges situated in other States. The question is whether these contentions raised by the learned Government Pleader are legally sustainable.

3. A perusal of the Information Bulletin issued by the Regional Engineering College, Tiruchirapalli in May, 1981, shows, that out of the total number of seats for the year, 50% had been allotted to candidates of Tamil Nadu and the remaining 50% has to be distributed among other States in India on population basis and that students from a particular State will compete amongst themselves for purposes of admission against the allotted seats. The selection of candidates for admission under Tamil Nadu quota (50%) is made by the common Selection Committee appointed by the State Government every year and candidates seeking admission under other States' quota should apply directly to their home State Regional Engineering College and the selection is made by that College. The following clauses in the said Information Bulletin are relevant for the purpose of this case and, therefore, they are set out in full:

> "3. The domicile of a candidate, *i.e.*, the State to which a candidate belongs will be determined on the basis of the location of the School|College|Institution from which a candidate has passed the qualifying examination and not the place of residence, permanent or temporary of his parents.
>
> 4. 15 per cent. of the seats will be reserved for Scheduled Castes and 5 per cent. for Scheduled Tribes. Seats for students from foreign countries to be sponsored by the Ministry of External Affairs will be reserved out of the quota allotted for other States".

Clause 3 set out above fixes the domicile of a candidate that is, the State to which he belongs for purposes of determining as to which State he must apply and it says that such domicile is determined with reference to the College or School from which the candidate passes the qualifying examination and not the place of residence, permanent or temporary of his parents. Clause 4 states that seats for students from a foreign country to be sponsored by the Ministry of External Affairs will be reserved out of the quota allotted for other States. Thus it is clear that it is only for the purpose of showing from which quota of 50% reservation has to be made for foreign students. Clause 4 clearly shows that the reservation of seats for foreign students can be only out of the 50% quota set apart for those students whose domicile as determined by clause 3 is outside the State. In this case there is no dispute that the petitioner has passed the qualifying examination in Madras and that he has obtained the required marks for making an application for admission to the Regional Engineering College. The question is whether the petitioner having passed the qualifying examination in Madras is disqualified from applying as a foreign candidate.

4. Clause 3 fixing the domicile of a candidate is said to apply both to local candidates as well as foreign candidates. It is in that view the second respondent has rejected the claim of the petitioner for admission to the College since his domicile is outside the State. It is not possible to accept this interpretation of clause 3. Clause 3 is intended to fix the domicile of candidates applying from the various States and it is not intended to fix the domicile of foreign candidates. As a matter of fact this is clear from the guidelines issued by the Ministry of External Affairs, Students Cell, Government of India for admission of foreign students in the Medical and Engineering Colleges in India (Self financing). Clause 3 (*c*) under the head "Eligibility conditions" dealing with Engineering (4 years) degree course other than III says as follows:

> "A pass in pre-engineering|Intermediate|1st year TDC|Final examination of 10 plus 2 system in India or an equivalent Indian or foreign qualification with Physics, Chemistry and Mathematics as subjects secur-

ing not less than 50% marks in each. A pass in English is also necessary".

This clause clearly indicates that a foreign student having passed an examination of 10 plus 2 system in India or any other Indian qualification if he had secured not less than 50% marks may apply. In the same guidelines under the head "how to apply" in clause 7, it is stated that foreign students studying abroad must apply through the Indian Mission in the student's country and the foreign students studying in India through the Diplomatic Mission of the Student's Country in India. Therefore it is clear that the foreign students staying in India are also entitled to apply as foreign students under the quota reserved for foreign students. It is only on the basis of that guideline, the first respondent has selected the petitioner as a candidate entitled to get a seat reserved for foreign students. Thus the first contention advanced on behalf of the second respondent that as the petitioner has passed the qualifying examination in India he is not entitled to claim as a foreign student is without any substance and clearly untenable.

5. Coming to the second ground urged on behalf of the second respondent, I am clearly of the view that clause 3 which fixes the domicile of a candidate with reference to the School or College in which the candidate had studied only applies for determining the question as to whether the candidate could claim admission from which quota, the State quota of 50% or outside the State quota of 50% and it serves no other purpose. Here clause 4 having specifically stated that foreign students can claim a seat only under the quota reserved for other States, the petitioner's domicile is not relevant. Apart from the fact that clause 3 is intended to fix the domicile of candidates coming from various States in India and has no application to a foreign candidate its application cannot further be extended even to foreign students in whose favour some seats have been reserved out of the quota allotted to other States. I cannot agree with the learned Government Pleader that even so the petitioner has to apply to the Regional Engineering Colleges in other States and not in the Colleges of this State because of clause 3 set out above as it involves the unnecessary and unjustified extension of clause 3. I have to therefore accept the contention of the petitioner that he is entitled to be admitted in the College in pursuance of the nomination made by the first respondent.

6. The writ petition is therefore allowed and a *mandamus* will issue as prayed for. There will be no order as to costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. R. Gokulakrishnan, Offg. CJ.* and *P. Venugopal, J.*

R. Srinivasan .. *Appellant**

v.

Union of India, represented by its Secretary to Government of India, Ministry of Finance Department of Revenue, New Delhi and another .. *Respondents.*

Central Civil Services (Conduct) Rules (1964), *rules* 3 (1) (iii) *and* 16—*Income-tax Officer—Stay in a lodge from 26th July,* 1973 *to 3rd September,* 1976—*Rent paid upto 31st July,* 1973—*Rent for period 1st August,* 1973 *to 3rd September,* 1976 *paid on 10th November,* 1976—*Charge framed against the Government servant for acting in a manner unbecoming of a public servant contravening rule* 3 (1) (iii) *of the Central Civil Services (Conduct) Rules,* 1964 — *Explanation by the officer not accepted by the Enquiry Officer—Income-tax Officer removed from service—Petition under Article* 226, *by dismissed officer — Appeal—Appellant held not guilty of conduct unbecoming of a Government servant—Constitution of India* (1950), *Article* 226.

One 'S' while working as Income-tax Officer (Estate Duty) at Madurai stayed in a lodge from 26th July, 1973 to 3rd September, 1976. He paid the rent uptill 31st July, 1973. For the balance of period he paid the rent only on 10th November, 1976. On 27th January, 1978, a charge was framed against 'S' for abusing his official position and that he had contravened rule 3 (1) (*iii*) of the Central

*W.A. No. 258 of 1980.
29th October, 1981.

Civil Services (Conduct) Rules, 1964. *'S'* submitted an explanation that as he came to stay permanently in the lodge, he wanted the management to fix the monthly rent and that the delay in payment was only due to the non-fixing of the monthly rent by the management. However, the Enquiry Officer rejected the explanation and the matter was referred to the Union Public Service Commission which concurred with the view of the Enquiry Officer. On 13th December, 1979, the order removing *'S'* from service was passed. *'S'* filed a writ petition without success, and thereafter filed a writ appeal.

Held: What is conduct unbecoming of a Government servant has not been defined or explained in the Central Civil Services (Conduct) Rules, 1964. According to Webster's International Dictionary, the word "unbecoming" means "unsuitable", "indecorous", "improper". In the light of the ordinary dictionary meaning of the word, a conduct which is indecent, reprehensible or abominable involving moral though not legal lapses, is conduct unbecoming of a Government servant.

[*Para*. 12.]

An innocent indiscreet act on the part of the appellant in not paying the rent in the hope that he can pay the same as soon as the monthly rent is fixed, cannot be characterised as conduct unbecoming of a Government servant especially when a Government servant is permitted to have credit facilities with a *bona fide* trader under rule 16 of the Central Civil Services (Conduct) Rules, 1964.

[*Para*. 12.]

Cases referred to:—

Edwards (*Inspector of Taxes*) v. *Bairstow*, (1956) A.C. 14; *P. T. Services* v. *State Industrial Court*, (1963) 2 S.C.J. 412: (1963) 3 S.C.R. 650: (1962) 2 Lab.L.J. 360: A.I.R. 1963 S.C. 114; *M. Mayandi* v. *The Director, Tamil Nadu State Transport Department*, (1981) 3 S.C.C. 89: (1981) 2 Lab.L.J. 146: A.I.R. 1981 S.C. 1707; *Mrs. Bijili Cotton Mills* (*P.*) *Ltd*. v. *The Presiding Officer, Industrial Tribunal* (*II*), (1972) 3 S.C.R. 910: (1972) 2 Lab.L.J. 320: A.I.R. 1972 S.C. 1903; *Mahanabhai Dungarbhai Parma* v. *Y. B. Kala*, (1979) 55 F.J.R. 140: 20 G.L.R. 497: (1980) Lab.I.C. 89; *C. N. Ramasami* v. *The Chief Engineer, Distribution, Tamil Nadu Electricity Board*, (1981) 94 L. W. 399: (1980) Lab.I.C. 1260.

Appeal under clause 15 of the Letters Patent against the order of Mohan, J., dated 13th February, 1980, in W.P. No. 792 of 1980.

R. Sukantha Raj, M. G. Shanmugham, A. Ilango and *A. Moscow*, for Appellant.

Mrs. Nalini Chidambaram, for Respondents.

The Judgment of the Court was delivered by

Venugopal, J.—The appellant while working as Income-tax Officer (Estate Duty) at Madurai, stayed in Sri Ranga Lodge, an annexe to the New College House, Madurai, from 26th July, 1973. He paid the rent till 31st July, 1973. He did not pay the rent from 1st August, 1973 to 3rd September, 1976, the entire period of his stay in Sri Ranga Lodge. On 10th November, 1976, a cheque for Rs. 6,000 was sent towards rent by the appellant's brother. On 1st December, 1976 stamped receipt was issued by the Lodge showing payment of rent by the appellant for the entire period of his occupation. On 27th January, 1978, charge was framed against the appellant that he failed to pay rent payable for the period of his occupation in spite of repeated demands from the Management and Hotel staff and has abused his official position and acted in a manner unbecoming of a public servant and thereby contravened rule 3 (1) (*iii*) of Central Civil Services (Conduct) Rules, 1964. The appellant submitted an explanation that as he came to stay permanently in the Lodge, he wanted the Management to fix the monthly rent as the daily tariff rate was not applicable to permanent residents and the Hotel Management neither fixed the monthly rent nor sent any bill and thus the delay in payment was only due to the non-fixing of the monthly rent by the management. The appellant further explained that on account of the delay in fixing the monthly rent, he could not claim the house rent allowance from the Government and was thus put to loss, and as the Estate Duty Officer, he had nothing to do with the Income-tax, Wealth-tax assessment of the owners of the Lodge and he had no kind of official dealings with the Lodge owner and no improper motive could be attributed for delayed payment of rent due to a *bona fide* reason. The expla-

nation was not accepted, and the enquiry officer held that the charge against the appellant was proved. The matter was referred to the Union Public Service Commission, which concurred with the findings of the Enquiry Officer, and recommended that the appellant is not a fit person to be retained in Government service and the penalty of removal from service should be imposed on him. Then the impugned order came to be passed on 13th December, 1979 removing the appellant from service for contravening rule 3 (1) (*iii*) of Central Civil Services (Conduct) Rules, 1964. The appellant filed a writ petition challenging the impugned order. The main ground alleged in the writ petition is that the delay in payment of rent was only due to the failure of the Hotel Management in fixing the monthly rent payable and as there is no evidence to support the findings of the enquiry officer that the rent was not paid in spite of demand by the Hotel Management, and as rule 16 (4) (*b*) of the Central Civil Services (Conduct) Rules, 1964 allows a Government servant to have credit facilities with a *bona fide* trader, the charge of the appellant having violated rule 3 (1) (*iii*) cannot, therefore, be legally sustained. The learned single Judge of this Court, even without admitting the writ petition, dismissed it. The learned Judge concurred with the finding of the Union Public Service Commission that the subsequent payment of Rs. 6,000 by the appellant's brother was made only after coming to know that the C.B.I. were enquiring into the matter and the Management of the lodge would not have allowed the appellant free lodging facilities but for his official position and thus there was abuse of official position on the part of the appellant. The learned Judge refused to accept the plea of the appellant that he was demanding settlement of accounts and ultimately the account came to be settled and the appellant should have stayed in the Lodge for three years without payment of rent is certainly a conduct unbecoming of a Government servant, and, therefore, the case squarely falls within rule 3 (1) (*iii*) of the Central Civil Services (Conduct) Rules, 1964, and rule 16 can have no application to the appellant's case. On these findings, the learned Judge dismissed the writ petition, against which the present writ appeal is filed before this Court.

2. After the filing of the writ appeal, the first respondent has filed a counter containing the following averments. The belated payment of Rs. 6,000 made on 26th October, 1976 by the appellant's brother was made only after the matter was taken up for verification and enquiry by the C.B.I. officials. The appellant failed to pay the rent payable for the prolonged occupation by him and his friends, in spite of repeated demands by the Management and hotel staff, and thereby abused his official position and acted in a manner unbecoming of a public servant thereby contravening the provisions of rule 3 (1) (*iii*) of the Central Civil Services (Conduct) Rules, 1964. The appellant has no right to request this Court to constitute itself into a Court of appeal against the finding of the enquiry officer. It has been independently investigated and approved by the Union Public Service Commission and the request that this Court should go into minute details and reappraise the evidence in the manner required by the appellant cannot be acceded to. In its writ jurisdiction under Article 226 of the Constitution, this Court cannot convert itself into a Court of first appeal. The finding of the enquiry officer is neither perverse nor unwarranted by the evidence on record. The appellant has not maintained the probity and integrity required of him in the discharge of his public duties and has misused his official position for personal advantage and the writ appeal should, therefore, be dismissed.

3. The learned counsel for the appellant contended that the residuary charge under rule 3 (1) (*iii*), that the Government servant shall at all times do nothing which is unbecoming of a Government servant is applicable only when the case does not fall under any other category of charges listed under rule 3 and when the charge is that the appellant's conduct is one which is unbecoming of a Government servant, the Union Public Service Commission has found him guilty of misusing his official position and the learned single Judge of this Court has gone a step further and given a finding of lack of integrity, and the very fact that these findings have traversed far away from the charge framed against the appellant is sufficient to vitiate them. The learned counsel further contended that the crux of the charge against the appel-

lant is that in spite of repeated demands from the Hotel Management and Staff, the appellant did not pay the lodge rent from August, 1973 to September, 1976, and as there is no evidence for the alleged demand, the finding of the enquiry officer is vitiated for want of evidence, and the order of dismissal should therefore, be quashed.

4. The learned counsel for the respondents contended that the very fact that the appellant stayed in the Lodge from August, 1973 to September, 1976, without paying rent and paid the same only after coming to know of the C.B.I. enquiry, is sufficient to establish that his conduct is one which is unbecoming of a Government servant and the evidence of P.Ws. 1 and 2 establish that the demand for payment of rent was made on the appellant and this Court cannot reappraise the evidence of P.Ws. 1 and 2 as if it is a Court of appeal.

5. In *Edwards (Inspector of Taxes)* v. *Bairstow*[1], Lord Radcliffe observed that where a determination based on findings of fact was assailed as bad in point of law, the Court had to consider the objection, even if nothing which is *ex facie* bad in law appears on the face of the determination.

> "......it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test ......I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

1. 1956 A.C. 14.

6. The principle laid down in this decision was followed by the Supreme Court in *P. T. Services* v. *State Industrial Court*[1], and it has been pointed out that in a writ of *certiorari,* a Court cannot convert itself into a Court of appeal and reappraise the evidence and it can interfere only if there is no evidence to support the finding. So, a finding of a quasi-judicial authority based on no evidence, but on assumptions and conjectures is liable to be quashed in a writ of *certiorari*. A finding of fact without evidence is an error of law, and it is a graver error if there is evidence in existence to the contrary. An attempt to determine whether the finding of fact is supported by evidence, cannot be characterised as reappraisal of evidence and thus bar the Court's scrutiny on the finding recorded. So the question to be determined is whether the finding that the appellant did not pay any rent in spite of demands by the hotel staff and management is supported by evidence and, secondly, whether this finding is contrary to the evidence on record. P.W. 2, the Manager of the Lodge, admitted in cross-examination:

> "I have not asked Sri Srinivasan personally to make the payment......I was sure of recovery of rent from Sri Srinivasan and therefore I did not ask Sri Srinivasan to vacate the room."

So P.W. 2's evidence does not establish that any demand for payment of rent was made on the appellant. The evidence of P.W. 1 shows that only statement of rent is prepared by him and that he does directly collect the arrears of rent from the customers and only the Chief Cashier used to demand the rent from the occupants. In cross-examination P.W. 1, stated "I asked Sri Srinivasan to pay the rent charges about two times but he told that he will pay the amount to the Manager." Whether this can constitute evidence for demand for payment of rent, we think not. Before making a demand, there should

1. (1963) 3 S.C.R. 650: (1962) 2 Lab. L.J. 360: (1963) 2 S.C.J. 412: A.I.R. 1963 S.C. 114.

be quantification of rent payable. When the monthly tariff rate has not been fixed and no quantification of rent or bill was issued to the appellant, how can there be demand for payment of rent on the appellant? A valid demand for payment of rent is not, therefore, established by the evidence of P.W. 1.

7. Now we proceed to the next question whether the finding that there was demand for payment of rent is contrary to the evidence on record. Exhibit D-1 is a letter issued to the appellant at the time of final settlement of the rent bill. Exhibit D-1 recites—

"Sri Ranga Lodge Madurai, dt. 1—12—76
To

R. Srinivasan, Income-tax Officer, Madurai,

Sir,

We are sending herewith our final stamped receipt for Rs. 5,415 (Five thousand four hundred and fifteen only) towards the rent for your stay in our Lodge. On enquiry, we understand that our accountant Gopalakrishnan has been negligent in the settlement of your account even though you had been asking for settlement of the same. We regret for the inconvenience caused to you. Thanking you.

Your's faithfully,
sd. ....

for Ranga Lodge."

The learned counsel for the respondents contended that there was no provocation for writing Exhibit D-1 to the appellant and its reading sounds so artificial that it cannot be believed as genuine letter. When the monthly rent payable by the appellant was settled after a considerable lapse of time, why there was such an inordinate delay has to be explained, and the Hotel Management under Exhibit D-1 explains by stating that the Accountant Gopalakrishnan was negligent in the settlement of account, though the appellant has been asking for settlement of the same. The explanation offered under Exhibit D-1 is quite natural and convincing. The plea that there was no provocation for the Hotel Management to write a letter like Exhibit D-1 cannot, therefore, be accepted.

8. With regard to the doubts thrown on the genuineness of Exhibit D-1, P.W. 2 has stated that Exhibit D-1 was shown to him at the time of issuing the final bill and his clerk has issued Exhibit D-1. When the hotel management itself has not disowned the letter Exhibit D-1 and accepts that it was issued at the time of settlement of the final bill, it is not open to the respondents to doubt the genuineness of Exhibit P-1. It was sought to be made out by the respondents that Exhibit D-1 must have been issued to oblige the appellant and save him from the departmental enquiry and disciplinary proceedings. The charge memo. was issued against the appellant on 27th January, 1978, whereas the letter under Exhibit D-1 was given to the appellant so early as 1st December, 1976. If the respondents' plea is to be accepted, it would mean that anticipating departmental proceedings and to forestall any such departmental enquiry, the hotel management and the appellant must have conspired together and brought about Exhibit D-1, more than one year before the commencement of the enquiry against the appellant. Could there have been such a conspiracy and what could have been the motive? It is common ground that the appellant has nothing to do with the assessments (Income-tax, wealth-tax and estate duty assessments) of the owners of the lodge. It is also common ground that no favours were shown by the appellant by use of his official position, to the Lodge owners. Apparently the nature of the job of the appellant was such that he could not have been in a position to do or show any favour to the lodge owners. In fact, the evidence shows that the monthly rent fixed for the appellant was Rs. 150 as against Rs. 100 fixed for officers of the Commercial tax department. When such is the position and when an enquiry against the appellant has been commenced by the C.B.I. officials, and that too, at the time of emergency, will the hotel management go to the extent of conspiring with the appellant and bring about a letter like Exhibit D-1 to save him from the departmental enquiry? We think not. It is not disputed that the appellant has paid the mess and telephone bills during the period of his stay in the Lodge and no rent bills were ever issued to him. It is also not in dispute that because of the guarantee of permanent occupation of the room, there is variation in the daily tariff rate of rent and the monthly tariff rate. Even when the rent was paid in one lump sum by the appellant's brother, the monthly tariff rate was not fixed. That accounts for the appel-

lant's brother sending one lump sum payment of Rs. 6,000 and the Lodge, after adjusting Rs. 5,415 towards rent, paying the balance to the appellant. The appellant's financial ability to pay the rent is not disputed and P.W. 2's evidence shows that he was confident that he can get the rent from the appellant at any time. Viewed against the background of these facts, the appellant's contention that the delay in paying the rent was only due to the delay in fixing the monthly tariff rate by the hotel management, sounds true, and Exhibit D-1 was not brought about to save the appellant from departmental action but merely reflects the true state of affairs. The person who wrote Exhibit D-1 has not been examined. P.W. 2 has not chosen to state that Exhibit D-1 was issued to oblige or help the appellant. The finding that Exhibit D-1 came to be issued to help the appellant is an inference based on surmise, suspicion and conjecture. It, therefore, follows that the finding that there was demand for payment of rent is not supported by evidence. On the other hand, the finding is contrary to the evidence on record. On this ground the impugned order of removal from service is liable to be quashed.

9. In the decision reported in *M. Mayandi* v. *The Director, Tamil Nadu State Transport Department*[1], the appellant was suspended from duty pending enquiry into certain charges levelled against him. On a writ petition filed by the appellant, the learned single Judge of this Court held that there was no material to support the charges and the charges could not be taken to have been proved. On a writ appeal, a Division Bench of this Court held that there were sufficient materials to sustain the charges. On appeal, the Supreme Court held that there was no evidence to substantiate the charges levelled against the appellant, and the order of the Division Bench was set aside and that of the single Judge restored. If there is no evidence to substantiate the charge levelled against the appellant that can certainly be a ground for interference in writ appeal. In the instant case, the gravamen of the charge is that in spite of demand the appellant had failed to pay the rent, and as there is no evidence to substantiate the charge that there was a demand and a failure to pay the rent, the impugned order is liable to be quashed.

10. In the decision reported in *Messrs. Bijli Cotton Mills (P.) Ltd.* v. *The Presiding Officer, Industrial Tribunal, II Allahabad and others*[1], a vital plea was ignored as a result of which evidence on that plea came to be excluded and it was pointed out that it was an eminently fit case for interference under Article 226 of the Constitution, the error being gross and palpable and manifest on the face of the record, and resulted in failure of justice by excluding the evidence on a most vital point. In the instant case, by excluding the consideration of Exhibit D-1, which affords evidence on a most vital plea, there is a palpable error manifest on the face of the record resulting in failure of justice and as such there is a ground for interference under Article 226 of the Constitution and the impugned order is accordingly quashed.

11. Relying on a decision of the Gujarat High Court reported in *Mahanabhai Dungarbhat Parma* v. *Y. B. Kala and another*[2], the learned counsel for the appellant contended that delay by itself would constitute denial of reasonable opportunity to show cause and as there was a delay of more than one year in charge-sheeting the appellant, there is violation of natural justice, and the order passed is vitiated and is liable to be set aside. In the case relied on by the learned counsel for the appellant, departmental proceedings were initiated against the employee after a delay of 1½ years after the incident in respect of which the charge-sheet was framed. It was held that if the charge or accusation was levelled very soon after the lapse, the employee could have rendered an appropriate explanation, and not having done so for more than 1½ years, after the occurrence, cannot be penalised for not being able to show cause to the satisfaction of the disciplinary authority and the very delay in initiating proceedings must be held to constitute a denial of reasonable opportunity to defend himself. The above decision has been followed by this

1. (1981) 3 S.C.C. 89: (1981) 2 Lab. L.J. 146: A.I.R. 1981 S.C. 1707.

1. (1972) 3 S.C.R. 910: (1972) 2 Lab. L.J. 320: A.I.R. 1972 S.C. 1902.
2. (1979) 55 F.J.R. 140: 20 G.L.R. 497: (1980) 2 Lab.I.C. 89.

Court in an unreported case in (*C. N. Ramasami* v. *The Chief Engineer Distribution Tamil Nadu Electricity Board and another*[1]). In the instant case, the rent was paid in full and the receipt obtained on 1st December, 1976. Exhibit D-1 mentions that the Accountant Gopalakrishnan had been negligent in the settlement of accounts, even though the appellant was asking for settlement of accounts. The charge memo. was issued to the appellant only on 27th January, 1978. If the charge memo. was issued and enquiry was held soon after payment of rent bill or within a reasonable time thereafter, opportunity for the appellant would have been available to examine the said Gopalakrishnan and establish his case. As the departmental proceedings commenced against the appellant nearly 1½ years after the payment of the rent bill, the appellant had lost the valuable opportunity of examining Gopalakrishnan, as he had expired by that time. If the charge had been levelled against the appellant soon after the lapse, the appellant would have substantiated his explanation by examining Gopalakrishnan and he cannot now be penalised for his inability to prove his plea to the satisfaction of the disciplinary authority. Under these circumstances the delay in charge-sheeting the appellant constitutes a denial of reasonable opportunity to show cause, and on this ground also the impugned order is liable to be quashed.

12. What is conduct unbecoming of a Government servant has not been defined or explained in the Central Civil Services (Conduct) Rules, 1964. According to Webster's International Dictionary, the word "unbecoming" means "unsuitable", "indecorous", improper'. In the light of the ordinary dictionary meaning of the word, a conduct which is indecent, reprehensible or abominable involving moral though not legal lapses, is conduct unbecoming of a Government servant. In the instant case, if the appellant had not paid the rent even after the bill was sent to him or claimed house rent allowance from the Government without paying the rent to the Lodge, or had done some favours by virtue of his official position and was expecting that recovery of rent may be waived by the Lodge, or that his financial position was so weak that he could never have been expected to pay the rent, they may indicate a conduct unbecoming of a Government servant. An innocent indiscreet act on the part of the appellant in not paying the rent in the hope that he can pay the same as soon as the monthly rent is fixed, cannot be characterised as conduct unbecoming of a Government servant, especially when a Government servant is permitted to have credit facilities with a *bona fide* trader under rule 16 of the Central Civil Services (Conduct) Rules, 1964. The learned counsel for the respondent relied on a decision of a Division Bench of the Kerala High Court in (*Natarajan* v. *Divisional Superintendent, Southern Railway*)[1]. There the charge was that the delinquent official issued cheques knowing full well that there was no sufficient fund in the bank to honour those cheques and he had thus failed to maintain absolute integrity and devotion to duty and his conduct was unbecoming of a Government servant. In the instant case, there is no charge against the appellant that he failed to maintain absolute integrity and devotion to duty. The decision relied on by the respondents can, therefore, have no application to the facts of this case.

13. From the evidence on record, it is seen that the appellant has extensive jurisdiction extending to five districts and for about 20 days in a month he has to be on tour. He left the lodge on 3rd September, 1976 and in 1976, he settled the rent bill in full. Soon after vacating the Lodge the appellant had taken steps to pay the bill.

14. The appellant has received letters of appreciation and encomiums have been showered on him for his ability for detailed investigation and successfully prosecuting an assessee for concealment of income and for passing assessment orders making huge additions to the income returned and being upheld by the appellate authority. His ability in promptly (*sic*) assessing has also been acclaimed

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1. W.P. No. 3391 of 1971, dated 16th February, 1981, since reported in 94 L.W. 399: (1981) Lab.I.C. 1260.

1. O.P. No. 284 of 1973, dated on 12th March, 1975.

by his superiors. When even a small recognition or verbal appreciation of the work done by subordinate officers has almost become a rare phenomenon in Government service, it is no mean achievement for the appellant to have received letters of appreciation and encomiums for the good work done from superior officers of different designations and rank and at different points of time. That an unblemished, dedicated and devoted career of 36 years should have ended in ignominy with all the social stigma by the order of removal from service, is indeed unfortunate and it only highlights the general belief and dictum that inscrutable are the ways of destiny. That the appellant had to suffer the agony in silence and vindicate his cause in a Court of law by pursuing litigation lasting over a period of more than two years with all the expenses, anguish and uncertainty, is itself a sufficient punishment for the innocent indiscreet act committed by him. The appellant is attaining superannuation age in a few days from this date. The end is at sight. The time to depart has come. May the departure be in peace. With these observations, we allow the writ appeal and quash the impugned order removing the appellant from service. Parties to bear their own costs.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*R. Sengottuvelan, J.*

The Management, Sri Jayaram Motor Service, Rajapalayam .. *Appellant**

v.

Pitchammal .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 3—Night watchman—Death of —Death occurring 1½ hours after return from duty in the morning — Death due to stress and strain of the work — Application for compensation by wife of the night watchman before the Additional Commissioner for Workmen's Compensation — Compensation awarded—Appeal by management—Award of compensation upheld.

'*V*' was employed as a night watchman in a workshop. On 13th June, 1972, *V* died 1½ hours after return from duty in the morning. *V*'s wife filed an application for compensation before the Additional Commissioner for Workmen's Compensation who held that the death occurred due to stress and strain of the work and awarded a compensation of Rs. 7,000. The management filed an appeal,

Held: In order to entitle a workman for compensation there must be a causal relationship between the cause of death and his employment. If a workman died even after leaving the work as a result of stress and strain which he suffered earlier during the period of work a connection is established between the employment and his death. [*Para.* 12.]

Though the death occurred 1½ hours after he ceased to do work it can only be said that the stress and strain sustained by him during the course of his work had contributed to his death. The finding of the Additional Commissioner that the workman sustained his death in the course of his employment will have to be upheld. [*Para.* 14.]

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*A.A.O. No. 226 of 1979.
20th February, 1981.

Cases referred to:—

Vai Diva Kaluji v. *Silver Cotton Mills Ltd.*, (1956) 1 Lab.L.J. 740: A.I.R. 1956 Bom. 424; *Sourashtra Salt Manufacturing Co.* v. *Bai Valu Raja,* (1958) 2 Lab. L. J. 249: A.I.R. 1958 S.C. 881; *General Manager, BEST Undertaking* v. *Mrs. Alnes,* (1954) 1 M.L.J. 618: 1954 S.C.J. 385: (1954) 3 S.C. R. 930: A, I. R. 1954 S. C. 321; *Duahiben Dharamshi* v. *New Jahangir Vakil Mills Ltd.*, (1976) A.C.J. 136; *Kamala Bai* v. *Divisional Superintendent Central Railway,* 1971 Mah.L. J. 330: 1971 Lab.I.C. 735: (1971) A.C.J. 170: A.I.R. 1971 Bom. 200; *Chhotulal* v. *Hamaram,* (1969) A. C. J. 346; *Kondisetti Anjiah* v. *T. Lakshmiah,* (1967) 2 An.W. R. 475: A.I.R. 1969 A.P. 15; *Mackinnon Mackenzie and Co., Ltd.* v. *Ibrahim Mohammed,* (1970) 1 S.C.R. 869: (1970) 2 S.C. J. 106: A.I.R. 1970 S.C. 1906

Appeal against the order of the Additional Commissioner for Workmen's Compensation Court, Madurai, dated 8th September, 1978 in W.C.A. No. 66 of 1973.

M. N. Krishnamani, for Appellant.

G. Desappan, for *G. Krishnan, M. Danasagaran* and *B. Jayaraman,* for Respondent.

The Court made the following

ORDER.—This civil miscellaneous appeal arises out of the orders of the Additional Commissioner for Workmen's Compensation, Madurai in W.C. Application No. 6 of 1973. One Pitchammal, wife of Vanniappa Pillai residing in Vedabadra Sayanar East Street, Srivilliputtur, filed the abovesaid W.C. Application No. 66 of 1973, against the management of the Jayaram Motor Service at Srivilliputtur. In the application before the Additional Commissioner for Workmen's Compensation it is stated that her husband late Vanniappa Pillai was a workman employed by the opposite party for 17 years prior to 13th June, 1972, and on the 13th June, 1972, he died in the course of his employment. Her husband Vanniappa Pillai left the house for duty on 13th June, 1972, and on the way to the workshop due to heart attack he fell down and was given treatment and subsequently died. She claimed a compensation of Rs. 7,000. In the counter-statement the opposite party admitted that Vanniappa Pillai was working under the opposite party as a watchman and he died on 13th June, 1972. The opposite party denied that he died as a result of fatal accident. The case of the opposite party is that the watchman died near his house at 8 A.M. on 13th June, 1972, when he started to go somewhere, due to old age. After his death, his wife applied for the final settlement of the provident fund accumulations with a death certificate from Srivilliputtur Municipality in which it is stated that he died due to old age. In the additional counter-statement it is stated that the husband of the applicant was employed only as a night watchman and that his duty hours closed well before 7 A.M. on 13th June, 1972, and he had no business to go over to the opposite party's workshop during the day time. The applicant's husband died due to natural causes and the applicant filed an application before the Additional Commissioner for Workmen's Compensation, Madurai on 20th May, 1973, claiming compensation, only to get an unlawful gain.

2. The Workmen's Compensation Act is enacted for the purpose of enquiring into accidents and for determining the compensation payable to the employees in respect of injury by accident in the course of employment. In the instant case, the deceased was not on duty, nor was he on his way to duty as alleged in the application. Since he died purely due to natural causes, no compensation is payable. The applicant had obtained two death certificates from the Srivilliputtur Municipality. The first certificate was obtained on 26th June, 1972 and the second on 19th March, 1973. Both the certificates disclose that there has not been any medical attendant who attended on the deceased. The first certificate discloses the cause of death as due to "old age" whereas the second certificate discloses the cause of death as due to "*Angina pectoris*", which interpreted in layman's language is "pain and congestion of heart". The applicant had also obtained a medical certificate long after her husband's death from one Thiru A. R. M. Louis, Homeopathic Physician and Consultant, who presumably is not a Registered practitioner under the Indian Medical Councils Act. Hence the certificate given by him cannot be taken into consideration. Again, even the said certificate does not say that the deceased came to him during his working hours. Hence, judged by all standards, the death of the deceas-

ed is solely due to natural causes, for which the applicant is not entitled to any compensation under the Workmen's Compensation Act.

3. Before the Additional Commissioner for Workmen's Compensation three witnesses were examined on behalf of the applicant. P.W. 1 is one Dr. A. R. M. Louis, Homeopathic Practitioner at Srivilliputtur. He deposed that on 13th June, 1972, he examined the applicant's husband, Thiru Vanniappa Pillai, that he was suffering from heart disease; that he came to his clinic at 7-30 A.M. on 13th June, 1972, and that when he was examining the patient he expired due to heart failure. The second witness is the applicant. She deposed that her husband left the house at 6 A.M. on 13th June, 1972, for work, wearing a khaki shirt and trouser. She denied the suggestion that her husband was employed only during night as watchman. The third witness on behalf of the applicant is one P. Mariammal. She deposed that at about 7-30 A.M. on 13th June, 1972, she had seen Thiru Vanniappa Pillai proceeding to work and that he collapsed near the residence of the doctor P.W. 1. On behalf of the opposite party two witnesses were examined. the first witness is S. Gnanapandian the Branch Manager of the opposite party. He deposed that the deceased person died due to natural causes and that he was wearing dhoti, shirts and angavastram at the time of his death. The second witness on behalf of the opposite party is one D. R. Srinivasan. the Manager of the opposite party. He deposed that the deceased person did not come to work on the morning of 13th June. 1972, and his death is not due to any accident arising in the course of his employment.

4. The Additional Commissioner for Workmen's Compensation awarded a compensation of Rs. 7,000 relying on the judgment reported in *Vai Diva Kaluji* v. *Silver Cotton Mills Ltd.*[1], in which case the workman had worked for 8 hours on a hot day and died. The Bombay High Court held that the death must have been accelerated by the strain of the work. When he died due to heart failure within six hours after his collapse the Bombay High Court came to the conclusion that the death must have been caused in the course of his employment. Relying on this decision and on the evidence of P.Ws. 1 to 3, the Additional Commissioner for Workmen's Compensation awarded a compensation of Rs. 7,000. Against the said order this civil miscellaneous appeal is filed.

1. (1956) 1 Lab.L.J. 740: A.I.R. 1956 Bom. 424.

5. The learned counsel for the appellant submits that in order to enable the respondent to obtain the compensation under section 3 of the Workmen's Compensation Act, the death must have been caused: (1) on account of personal injury; (2) arising out of an accident; and (3) in the course of employment and out of employment. None of the circumstances is present in this case to enable the respondent to claim compensation. On behalf of the appellant it is argued that the workman died according to P.W. 3, 300 ft. away from the workshop and according to R.W. 14 furlongs away from the workshop and in the death certificate issued by the Srivilliputtur Municipality in the first instance, *viz.*, Exhibit R-3 the cause of death is stated in column 16 as 'old age'. Exhibit R-3 was issued on 26th June, 1972, and only as an afterthought a subsequent certificate has been obtained from the Srivilliputtur Municipality, marked as Exhibit R-2, dated 19th March, 1973, in which the cause of death is stated as *angina pectoris*. It is also argued on behalf of the appellant that the respondent's husband was employed only as a night watchman, that his work ceased at 6 A.M. on 13th June, 1972, that he had no work during day time and that his death at 7-30 A.M. at a distance of four furlongs from the workshop of the opposite party cannot be said to be in the course of employment.

6. On behalf of the appellant reliance is placed upon the ruling reported in *Sourashtra Salt Manufacturing Co.* v. *Bai Valu Raja and others*[1], wherein it has been observed as follows—

"As a rule, the employment of a workman does not commence until he has reached the place of employment and does not

1. (1958) 2 Lab.L.J. 249: A. I. R. 1958 S.C. 881.

continue when he has left the place of employment, the journey to and from the place of employment being excluded. It is now well-settled, however, that this is subject to the theory of notional extension of the employer's premises so as to include an area which the workman passes and repasses in going to and in leaving the actual place of work. There may be some reasonable extension in both time and place and a workman may be regarded as in the course of his employment even though he had not reached or had left his employer's premises. The facts and circumstances of each case will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of notional extension".

Even this theory of notional extension cannot be applied in this case since the workman was not going to or coming from the work at the time of his death. The second case cited on behalf of the appellant is the ruling reported in *General Manager, BEST Undertaking, Bombay* v. *Mrs. Agnes*[1]. The majority view extracted in the head note is as follows—

> "that under the Rules, a bus driver is given the facility in his capacity as a driver to travel in any bus belonging to the undertaking, presumably to enable him to keep up punctuality and to discharge his onerous obligations. It is given to him not as a grace, but as of right because efficiency of the service demands it. Therefore, the right of a bus driver to travel in the bus in order to discharge his duties punctually and efficiently was a condition of his service and there was an implied obligation on his part to travel in the said buses as a part of his duty.
>
> Though the doctrine of reasonable or notional extension of employment developed in the context of specific workshops, factories or harbours, equally applies to such a bus service the doctrine necessarily will have to be adapted to meet its peculiar requirements. While in a case of a factory the premises of the employer which gives ingress or egress to the factory is a limited one, in the case of a city transport service, by analogy, the entire fleet of buses forming the service would be the 'premises' ".

7. The Supreme Court upheld the view of the Bombay High Court that the accident which occurred when the bus driver boarded another bus to go to his residence after finishing his work was during the course of his employment. The third case relied upon by the appellant is the case reported in *Mackinnon Mackenzie and Co., Ltd.* v. *Ibrahim Mohammed Issak*[1], where it has been observed in the head-note as follows—

> "To come within the Act the injury by accident must arise both out of and in the course of employment. The words 'in the course of the employment' mean in the course of the work which the workman is employed to do and which is incidental to it. The words 'arising out of employment' are understood to mean that "during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered". In other words, there must be a casual relationship between the accident and the employment. The expression 'arising out of employment' is again not confined to the mere nature of the employment. The expression applies to employment as such—to its nature, its conditions its obligation and its incidents. If by reason of any of these factors the workman is brought within the scene of special danger the injury would be one which arises 'out of employment'. To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In the

1. 1954 S.C.J. 385: (1954) 1 M. L. J. 618: (1954) 3 S.C.R. 930: A.I.R. 1954 S.C. 321.

1. (1970) 1 S. C. R. 869: (1970) 2 S.C.J. 106: A.I.R. 1970 S.C. 1906.

case of death caused by accident the burden of proof rests upon the workman to show that the accident arose out of employment as well as in the course of employment. But this does not mean that a workman who comes to Court for relief must necessarily prove it by direct evidence. Although the onus of proving that the injury by accident arose both out of and in the course of employment rests upon the applicant those essentials may be inferred when the facts proved justify the inference. On the one hand the Commissioner must not surmise, conjecture or guess; on the other hand, he may draw an inference from the proved facts so long as it is a legitimate inference. It is of course impossible to lay down any rule as to the degree of proof which is sufficient to justify an inference being drawn, but the evidence must be such as would induce a reasonable man to draw it".

8. The fourth case referred to by the appellant is the case reported in *Dudhiben Dharamshi and others* v. *New Jahangir Vakil Mills Ltd.*[1], where the workman met with his death when he was standing at a distance of 10.15 ft. from the main gate of the workshop as a result of knocking down by a cyclist. The Gujarat High Court held that the doctrine of notional extension is applicable because it was the incident of employment which brought the workman in the special danger zone in order to fulfil the condition of his employment. The fifth case cited on behalf of the appellant is reported in *Kamla Rai* v. *Divisional Superintendent Central Railway, Nagpur*[2], where the deceased workman was an engine driver. He took charge of a goods train at about 10 A.M. and rested for about two hours after taking charge. He did his normal duties for some time and again rested at the intermediate stations. While shunting at a wayside station at 4 P.M., the guard gave the red signal to stop the engine. He walked down to the guard to find out the reason for the red signal. While talking to him he collapsed. The Bombay High Court held that it could not be said that any strain of duty contributed towards his death. In such cases it was essential for the claimants to show that the deceased died not only because of the heart disease from which he suffered but also of some contributory cause on account of his employment or his duties which he was performing about the time of his death. It would not be enough to show that he died of that disease as a result of wear and tear of his employment. There must be some causal connection between the death of the workman and his employer.

9. The question whether an occurrence is an accident or not has to be determined from the point of view of the workman who suffers the accident. If the occurrence is unexpected and without any design on his part it may be said to be an accident, even if it had been caused by someone intentionally or wilfully.

10. Relying on these decisions it was urged on behalf of the appellant that the deceased workman did not die in the course of his employment, and even the notional extension of the place of work cannot be extended to the place where he died, that his death was only due to natural causes, that the claim was made only as an after-thought by the wife of the deceased workman and that the respondent is not entitled to compensation under section 3 of the Workmen's Compensation Act. It is laid down in *Saurashtra Salt Manufacturing Co.* v. *Bai Valu Raja and others*[1], that the facts and circumstances of each will have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of the workman. Keeping this observation in mind we have to examine the facts of this case. The case of the respondent is that her husband was employed as a watchman whereas the case of the appellant is that he was employed only as a night watchman and his work ceased at 6 A.M. In support of the contention of the appellant reliance is placed upon Exhibit R-5, where respondent's husband undertook not to sleep during his duty. Exhibit R-6 is the communication, dated 3rd April, 1970 stating that the respondent's husband slept during the work and that if he does so, here-

1. 1976 A.C.J. 136.
2. 1971 A.C.J. 170: (1971) Mah.L.J. 330: (1971) Lab.I.C. 735: A.I.R. 1971 Bom. 200.

1. (1958) 2 Lab.L.J. 249: A.I.R. 1958 S.C. 881.

after, he will be removed from service. Reliance was also placed upon Exhibit R-5, which is a muster roll of the workers maintained by Sri Jayaram Motor Service, Rajapalayam, the appellant herein where the respondent's husband Vanniappa Pillai is shown as the night watchman. The appellant also examined R. Ws. 1 and 2, *viz.*, the Branch Manager and the Manager of the appellant in proof of the case that the respondent's husband was employed only as a night watchman. As against this evidence we have only the self-serving testimony of the respondent as P.W. 2, that her husband was employed only as a watchman. It was also pointed out in the Pay Register, Exhibit R-8, the respondent's husband is not mentioned as night-watchman. But it is seen from the Pay Register for the 13 employees the designation is not given for any one and hence from the fact that the respondent's husband had not been described as a night-watchman in Exhibit R-8 will not in any way probablise the case of the respondent. Taking all the circumstances and the evidence on record, we have to conclude that the respondent's husband was employed only as night-watchman with the appellant.

11. The next aspect to be considered is whether the husband of the respondent sustained his death as a result of an accident. Accident had been defined in the reported decisions as an unforeseen and unexpected event. In this case, the respondent's husband sustained his death in an unexpected manner and the same could not have been foreseen by anybody. Hence the case of the respondent that her husband met with his death as a result of an accident will have to be accepted.

12. The next question to be considered is whether the respondent's husband met with his death in the course of the employment and out of the employment. It is laid down in the case reported in *Chhotulal* v. *Hamaram*[1], that it is incumbent upon the Commissioner to be clear in his finding in respect of the question whether the accident arose out of and in the course of his employment. The question that the accident arose out of employment depends upon the facts of each particular case. One test for determining this is whether it was a part of the injured person's employment to hazard, to suffer, or to do that which caused the injury. In the course of the judgment the following principles enunciated in *Kondisetti Anjiah* v. *T. Lakshmiah*[1], are quoted with approval:—

> "It is enough if it is established that: (1) at the time of the accident he was in fact employed on the duties of his employment; (2) that it occurred at the place where he was performing those duties; and (3) that the immediate act which led to the accident is not so remote from the sphere of his duties as to be regarded as something foreign to them."

In order to entitle a workman for compensation there must be a causal relationship between the cause of death and his employment. On a study of the above decisions it is evident that if a workman died even after leaving the work as a result of stress and strain which he suffered earlier during the period of work a connection is established between the employment and his death.

13. In the present case, the fact that the deceased workman died as a result of heart failure cannot be seriously challenged. We have the evidence of P.Ws. 1 and 3 to show that he collapsed suddenly at 7.30 A.M. near the residence of P.W. 1. R.W. 1 also does not dispute the fact that he died suddenly at 7.30 A.M. near the residence of P.W. 1. R.W. 1 does not dispute the fact that the deceased workman was taken to the Doctor who was examined as P.W. 1. The appellant would contend that P.W. 1 is not a fully qualified doctor and that Homeopathic physicians are not recognised and they are not entitled to issue certificates. But the fact that he was practising as Homeopathic physician is not disputed. The evidence of P.W. 1 and P.W. 3, the disinterested witnesses, who saw the deceased workman collapsing near the residence of P.W. 1 will have to be accepted. Even R.W. 1 admits that at the time when the deceased workman collapsed several women were present and the presence of P.W. 3 is not disputed. Considering the entire circumstances the only conclusion that can be arrived at is that the deceased workman died as a result of heart failure.

1. 1969 A.C.J. 346.

1. (1967) 2 An. W. R. 475: A.I.R. 1969 A.P. 15.

14. The next question to be considered is whether this heart failure could have been caused as a result of stress and strain received by him during the course of his work. It is the evidence of R.W. 1, that he attended his duty as a night-watchman during the previous night and that he worked throughout the night barring a small interval till 6 A.M., on 13th June, 1972. The duty as a night-watchman throughout the night without sleep will involve strain to the heart and the death in this case had occurred immediately after 1½ hours from the cessation of duty. The heart failure must have occurred only as a result of strain which the deceased workman had undergone by keeping awake during the entire night in the course of his duty. The interval from the cessation of duty and the death being 1½ hours it cannot be said that the stress and strain undergone by the deceased workman during the previous night had no relation to his death. Hence I have no hesitation in coming to the conclusion that though the death occurred 1½ hours after he ceased to do work it can only be said that the stress and strain sustained by him during the course of his work had contributed to his death. No doubt the case of the respondent that her husband was employed as a watchman does not appear to be true but even accepting the case of the appellant that he was only working as a night-watchman there is no difficulty in coming to the conclusion that the stress and strain which the deceased workman had received in the course of his duties on the previous night had contributed to his death, which occurred 1½ hours after his hours of duty. As observed in *Chhotulal* v. *Hemaram*[1], the cause of his death is not so remote from the sphere of his duties as to be regarded as something foreign to them. Hence the finding of the Additional Commissioner that the workman sustained his death in the course of his employment will have to be upheld.

15. The correctness of the quantum of compensation is not challenged by the appellant. In the result the civil miscellaneous appeal fails and is dismissed. However, there will be no order as to costs.

S.J. —— *Appeal dismissed.*

1. 1969 A.C.J. 346.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and R. Sengottuvelan, JJ.*

K. Gurumurthy, authorised representative of certain workers .. *Appellant**

v.

Simpson & Co., Madras and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947) as amended, section 25-M—Section violative of Article 19 (1) (f) and (g) of the Constitution of India—Constitution of India (1950), Article 19 (1) (f) and (g).

The two main defects pointed out by the Supreme Court in *Excel Wear* v. *Union of India,* (1978) Lab.I.C. 1537, (*i.e.*): (1) No guidelines are available from the statute; and (2) that there is no provision for scrutiny of the order passed by the authority by any higher authority or tribunal in appeal or in revision, are present even in section 25-M of the Industrial Disputes Act. Section 25-M is constitutionally invalid for violation of Article 19 (1) (*f*) and (*g*). [*Para.* 13.]

Cases referred to:—

Excel Wear v. *Union of India,* (1978) Lab. I.C. 1537: (1978) 2 Lab.L.J. 527; *K. V. Rajendran* v. *Deputy Commissioner of Labour,* (1980) 2 Lab.L.J. 275: 94 L.W. 583; *General Industrial Society Ltd.* v. *Commissioner of Labour,* (1980) 1 An.W.R. 92; *M/s. Dwaraka Prasad Laxminarain* v. *The State of Uttar Pradesh,* 1954 S.C.J. 238: 1954 S.C.R. 803: A.I.R. 1954 S.C. 224.

Appeal under clause 15 of the Letters Patent against the orders of Mohan, J., dated 7th January, 1977 and 10th January, 1977, in W. P. Nos. 3686 and 3778 of 1976, respectively etc.

G. Venkataraman, for *Aiyar and Dolia, A. L. Somayajee* and *R. Ramachandran,* for Appellant.

*W.A. Nos. 44, 110, 137 of 1977.
9th April, 1981.

V. K. T. Chari, for *Row and Reddy, S. Ramasubramanian,* for *King and Patridge, G. Ramaswami* and *V. Manivannan, P. R. Kumaramangalam, S. Jayaraman, K. N. Krishnamani,* for Respondents.

The Order of the Court was made by

Ramanujam, J.—As all these writ appeals and the writ petitions raise a common question, they are dealt with together. However, it is unnecessary to set out the facts in all the cases as the facts are substantially the same and it is sufficient to refer to the facts in the first case, *viz.*, W.A. No. 44 of 1977.

2. Messrs. Simpson & Co., Ltd., Madras, filed an application on 19th May, 1976, under section 25-M (2) of the Industrial Disputes Act, 1947, as amended, hereinafter referred to as the Act, to the Joint Commissioner of Labour, Madras, seeking permission to continue the lay-off of 139 out of 432 workmen employed in the establishment with effect from 5th March, 1976, for the reasons set out in item 21 of the Annexure to the application. The reasons set out in the said Annexure were: (1) non-availability of essential raw materials to run the operations in the carriage department and the Light Engineering section; (2) acute power shortage; (3) no possibility of procuring orders due to non-availability of raw materials; and (4) the company lost its market for the products manufactured in those departments necessitating the closure of the sales departments and there was no possibility of procuring orders in the foreseeable future and there is no possibility of revival of the operations in those departments pending final retrenchment of the workmen in those departments in accordance with the provisions of law.

3. Copies of the said application were also served on the concerned workmen. In a letter, dated 5th July, 1976, signed by 52 workmen, they represented that the lay-off of workmen by the management was not justified nor was there any justification for continuance of the same. The worker's Union also objected to the grant of permission to continue the lay-off of workmen as prayed for by the management.

4. The Joint Commissioner of Labour heard the representations of the management and the workmen represented by the Union on 26th July, 1976. It was submitted by the management that the application filed on 19th May, 1976, should have been disposed of before 19th July, 1976, that having regard to the fact that no order has been passed on the application, the deeming provision contained in section 25-M (4) had come into operation and that since the rules under the Act had been published and the authority was actually constituted only on 22nd March, 1976, the application filed on 19th May, 1976, should be taken to be in time as provided in section 24-M (2). The workmen, apart from opposing the application for lay-off on merits contended that the application was belated and that the deeming provision contained in section 25-M (4) will not come into operation.

5. The Joint Commissioner of Labour held that the lay-off application filed by the management has not been made to the specified authority within a period of 15 days from the date of the commencement of the Amending Act of 1976, as required under section 25-M (2), and cannot, therefore, be entertained and that in view of that finding the question of justification or otherwise for the continuation of the lay-off at the commencement of the Amending Act does not arise for determination. He also held that the deeming provision contained in section 25-M (4) does not arise as the lay-off application itself has been held to be out of time. In this view, the Joint Commissioner of Labour ultimately dismissed the application as not maintainable without going into the merits of the application by his order, dated 30th July, 1976.

6. Against the said order Messrs, Simpson and Co., Ltd., filed W.Ps. Nos. 3686 and 3687 of 1976, before this Court for the issue of a writ of *certiorari* to quash the said order and for a writ of *mandamus* directing the Joint Commissioner of Labour to dispose of the lay-off application, dated 19th May, 1976, on merits. The main ground urged by them was that the rules themselves were officially published only on 5th May, 1976 and, therefore, any lay-off application could be filed only from that date and the lay-off application having been filed by the management on 19th May, 1976, it was well within time, and that in view of the lay-off application not having been disposed of within two months the deeming provision in section 25-M (4) will stand attracted.

7. The writ petition was resisted by the Joint Commissioner of Labour as also the Unions of workmen. Their defence was that the amending Act had come into force on 5th March, 1976, that the authority to whom the application must be made has been notified on 22nd March, 1976, and therefore, they should have in any event, filed an application within 15 days from 22nd March, 1976 though not from 5th March, 1976.

8. After considering the rival contentions, Mohan, J., held that the lay-off application filed by the management was in time, that though amending Act of 1976 came into force on 5th March, 1976, the Act should be deemed to have come into force on 5th May, 1976, when the rules were published setting out the manner of application and the authority to receive the application under section 25-M and that as the lay-off application had not been disposed of within two months, the management will be entitled to the benefit of the deeming provision in section 25-N (2). Aggrieved by the judgment of Mohan, J., the workmen have filed W.A. Nos. 44 of 1977 and 10 of 1977 wherein they have questioned the view taken by Mohan, J., in the writ petitions.

9. In these two writ appeals, the respondents have questioned the constitutional validity of section 25-M. Hence, these writ appeals have been posted along with the writ petitions wherein the constitutional validity of section 25-M has been raised apart from other contentions. Thus the main question to be decided in all these cases is whether section 25-M is constitutionally invalid. The learned counsel for the respondents in the writ appeals and the petitioners in the writ petitions rely on the decision of the Supreme Court in *Excel Wear* v. *Union of India*[1], holding that section 25-O is constitutionally invalid for violation of Article 19 (1) (*g*) of the Constitution and the decision of a Division Bench of this Court in *K. V. Rajendran* v. *Deputy Commissioner of Labour*[2], holding section 25-N of the Act as unconstitutional and submit that the reasons given in those decisions for invalidating sections 25-O

1. (1978) 2 L.L.J. 527: 1978 Lab.I.C. 1537.
2. (1980) 2 L.L.J. 275: 94 L.W. 583.

and 25-N of the Act will squarely apply here and for the same reasons section 25-M also should be declared unconstitutional. The learned counsel for the contesting respondents in the writ petitions would, however, rely on a decision of a Division Bench of the Andhra Pradesh High Court in *General Industrial Society Ltd.* v. *Commissioner of Labour*[1], holding section 25-M to be constitutionally valid.

10. Before considering the question as to whether the reasons given by the Supreme Court in *Excel Wear* v. *Union of India*[2], for invalidating section 25-O and of this Court in *K. V. Rajendran* v. *Deputy Commissioner of Labour*[3], for invalidating section 25-N are sufficient to invalidate section 25-M as well, it is necessary to refer to the provisions in section 25-M of the Act and compare the same with sections 25-O and 25-N. A Division Bench of Andhra Pradesh High Court in *General Industrial Society Ltd.* v. *Commissioner of Labour*[1], after such comparison has pointed out the difference between sections 25-M and 25-O, which was the subject-matter of the decision before the Supreme Court and had held that because of that difference the reasons given by the Supreme Court for invalidating section 25-O will not apply to invalidate section 25-M.

11. Section 25-M (1) provides that no workman in an industrial establishment to which Chapter V-A applies shall be laid-off by his employer except with the previous permission of such authority as may be specified by the appropriate Government by notification in the official gazette, unless such lay-off is due to shortage of power or to natural calamity. Section 25-N (1) provides that no such workman who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until certain conditions are satisfied and until a notice in the prescribed manner is served on the appropriate Government or such authority as may be prescribed by the appropriate Government by notification in the official gazette, and the permission of such Government or autho-

1. (1980) 1 An.W.R. 92.
2. (1978) 2 L.L.J. 527: 1978 Lab.I.C. 1537.
3. (1980) 2 L.L.J. 275: 94 L.W. 583.

rity is obtained under sub-section (2). Section 25-O is to the effect that no employer shall close down such an undertaking of an industrial establishment without prior permission being obtained from an authority specified by the appropriate Government. Section 25-Q provides that any employer who contravenes the provisions of section 25-M or 25-N is punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees or with both. Section 25-R provides that any employer who closes down an undertaking without complying with the provisions of section 25-O (1) shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five thousand rupees or with both. Sub-sections (2) and (3) of section 25-R provide that an employer who contravenes sub-sections (2) and (3) of section 25-O shall be punishable with imprisonment for a term extending to one year or one month respectively. These sections occur in Chapter V-B of the Act which was introduced by the amending Act of 1976 and which applies to industrial establishments in which not less than 300 workmen are employed on an average per working day for the preceding 12 months as per section 25-K. There is no dispute that the industrial establishments before us do come within Chapter V-B. According to section 25-M, an employer must obtain the prior permission of such authority as may be specified by the appropriate Government by notification in the official gazette, for laying off workmen before the workmen are laid-off, and if the permission sought for is not refused within a period of two months, the permission applied for shall be deemed to have been granted on the expiration of the said period of two months. According to section 25-N an employer governed by Chapter V-B, has to give three months notice in writing indicating the reasons for retrenchment or payment of three months wages in lieu of such notice before retrenching a workman and also issue a notice in the prescribed manner on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the official gazette and obtain the permission of such Government or authority for retrenchment to which the notice relates. As per section 25-O an employer who intends to close down an undertaking of an industrial establishment to which Chapter V-B applies shall give a notice of the intended closure in the prescribed manner to the appropriate Government stating clearly the reasons for the intended closure of the undertaking and obtain the permission of such Government or authority for closing down the undertaking. The constitutional validity of section 25-O was challenged before the Supreme Court in *Excel Wear* v. *Union of India*[1], and the said section was held to be unconstitutional. The reasons for invalidating section 23-O given by the Supreme Court are these—

> "Intrinsically no provision of Chapter V-B suggests that the object of carrying on the production can be achieved by the refusal to grant permission although in the objects and reasons of the amending Act, such an object seems to be there, although remotely. It is highly unreasonable to achieve the object by compelling the employer not to close down in public interest for maintaining production. Although Chapter V-B deals with certain comparatively bigger undertakings, it does not make the law reasonable, though the classification of undertakings for purposes of the provisions of chapter V-B can be taken to be a reasonable classification for saving the law for violation of Article 14, it certainly does not make the restriction reasonable within the meaning of Article 19 (6). The reasonableness has to be tested both from the procedural and substantive aspects of the law. In case of *bona fide* closures though the reasons given by the employers are correct, adequate and sufficient, yet, the permission to close down can be refused on the ground of public interest because the interest of labour for the time being is bound to suffer as it makes a worker unemployed, but it is not reasonable to give them protection by compelling the employer to manage the undertaking even when they do not find it safe and practicable to manage the affairs, that they cannot be compelled to go on incurring losses year after year. There is already a built-in safeguard in section 25-FFF to prevent a *male fide*

1. (1978) Lab.I.C. 1537: (1978) 2 L.L.J. 527,

closure and the requirement as to permission before closure which may be refused by the appropriate Government even if the grounds set out in section 25-FFF are established will amount to an unreasonable restriction. The law may provide to deter the reckless, unfair, unjust or *mala fide* closures but cannot prevent the employer from closing down as it is essentially an interference with his fundamental right to carry on the business. Section 25-O does not provide any guidelines for the exercise of the power to grant or refuse permission. The appropriate Government may whimsically and capriciously refuse the permission to close down even if a case has been made out for closure. The section does not compel the appropriate Government to give reasons for the refusal. Any order passed by the authority is not subject to any scrutiny by any higher authority or Tribunal in appeal or in revision".

Section 25-N was challenged as constitutionally invalid before this Court in *K. V. Rajendran* v. *Deputy Commissioner of Labour*[1], for the same reasons as had been given by the Supreme Court in the above case for invalidating section 25-O. After considering the question as to whether the reasons given by the Supreme Court for striking down section 25-O will apply for striking down section 25-N, a Division Bench of this Court to which one of us was a party, took the view that section 25-N, suffers from the same arbitrariness and unreasonableness as pointed out by the Supreme Court with reference to section 25-O, that section 25-N or any other provision does not provide the guidelines as to how the application for permission by an employer for retrenchment has to be disposed of and on what grounds the permission can be refused, that it does not provide for any appeal or revision even against the arbitrary orders of refusal, that the provision is unreasonable in that the employer is forced to continue the employment of personnel who are found to be surplus for his requirements and thus incur unnecessary expenditure in connection with his undertaking, leading ultimately to curtailment of his profits, that there are already sufficient safeguards in the matter of retrenchment of workmen by the employer under sections 25-F, 25-G and 25-H and notwithstanding the said safeguards, to compel an employer to seek permission under section 25-N will be an unreasonable restriction violating Article 19 (1) (*f*) and (*g*) of the Constitution. Similarly, it is now contended before us that the reasons given by the Supreme Court for striking down section 25-O will also squarely apply here for invalidating section 25-M. According to the petitioners in the writ petitions, section 25-M also suffers from the same defects as had been pointed out by the Supreme Court in connection with section 25-O and of this Court in connection with section 25-N. It is said that section 25-M also does not provide any guidelines for the grant or refusal of permission and the authority may refuse the permission to lay-off workmen even if a case has been made out for such permission. Any order passed by the authority is also not made subject to scrutiny by any higher authority or tribunal in appeal or in revision. It is seen that even before the introduction of section 25-M, the Act provides for sufficient safeguards in the matter of laying off of the workmen. Section 2 (*kkk*) defines 'lay-off' as meaning the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery or for any other reason to give employment to a workman whose name is on the muster roll of his industrial establishment and who has not been retrenched.

12. Section 25-C confers certain rights on the workmen who have been laid-off to get compensation. It provides that whenever a workman whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid-off whether continuously or intermittently, he shall be paid by the employer for all days during which he is so laid-off, except for such weekly holidays as may intervene, compensation which shall be equal to fifty per cent. of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid-off. It also provides that if during the period of twelve months, a workman is so laid-off for more than forty-five days, no such compensation

1. (1980) 2 L.L.J. 275: 94 L.W. 583.

shall be payable in respect of any period of lay-off after the expiry of the first forty-five days if there is an agreement to that effect between the workman and the employer. Section 25-D compels the employer to maintain a muster roll for the purpose of this Chapter. Section 25-E provides that no compensation shall be paid to a workman who has been laid-off: (1) if he refuses to accept any alternative employment in the same establishment from which he has been laid-off, or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs; (2) if he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day; and (3) if such laying off is due to a strike or slowing down of production on the part of workmen in another part of the establishment. Thus the definition of 'lay-off' in section 2 (*kkk*) ensures that lay-off can be resorted to only on account of shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery and if the lay-off is resorted to by the employer he is liable to pay compensation as contemplated by section 25-C. Section 25-M (1) compels the employer to obtain prior permission of such authority as may be specified by the appropriate Government unless such lay-off is due to shortage of power or to natural calamity. Sub-section (2) of the said section contemplates permission being obtained to continue the lay-off in case the lay-off was in force when section 25-M had been introduced, within a period of 15 days from such commencement. Sub-section (3) directs the authority to whom the application has been made to make such enquiry as he thinks fit, and to grant or refuse the permission applied for reasons to be recorded in writing. Under sub-section (4) if the permission sought for is not granted within the expiry of two months from the date on which the application is made, the permission applied for shall be deemed to have been granted on the expiry of the said period of two months. Thus the two differences between section 25-M on the one hand and sections 25-O and 25-N on the other, are: (*i*) the authority to whom the appplication for permission is made, has to record the reasons in writing either for the grant or for refusal of the permission; and (*ii*) if the application is not disposed of within two months the permission should be deemed to have been granted. The question is whether the said two features alone are sufficient for upholding section 25-M to be a reasonable restriction.

13. It has been held in *Messrs Dwaraka Prasad Laxminarain* v. *The State of Uttar Pradesh and others*[1], that the requirements as to recording reasons in the order is not a sufficient safeguard as it is hardly effective, for, there is no higher authority prescribed in the order who could examine the propriety of the reasons and revise or review the decision of the authority and that the reasons to be recorded are only for his personal and subjective satisfaction and not for furnishing any remedy for the aggrieved person. It cannot, therefore, be taken that a mere provision requiring reasons to be recorded in writing is a sufficient safeguard against arbitrary refusal, unless there are guidelines from which it is possible to find out whether the reasons given for the refusal are proper and germane, and unless a right of appeal is given to a higher authority against the orders passed by the authority concerned. Similarly, the deeming provision in section 25-M (4) is not also a sufficient safeguard against arbitrary exercise of power to grant or refuse permission. That provision is intended to avoid delay in the disposal of the application for permission and to see that such applications are disposed of within a period of two months. Therefore the deeming provision in section 25-M (4) cannot be taken to govern the mode or manner of exercise of the power to grant permission. Thus the two main defects pointed out by the Supreme Court in *Excel Wear* v. *Union of India*[2], *i.e.*: (1) No guidelines are available from the statute; and (2) that there is no provision for scrutiny of the order passed by the authority by any higher authority or tribunal in appeal or in revision, are present even in section 25-M. As a matter of fact, in *K. V. Rajendran* v. *Deputy Commissioner of Labour*[3], while dis-

1. 1954 S.C.R. 803: 1954 S.C.J. 238: A.I.R. 1954 S.C. 224.
2. 1978 Lab.I.C. 1537: (1978) 2 L.L.J. 527.
3. (1980) 2 L.L.J. 275: 94 L.W. 583.

tinguishing the Andhra Pradesh case in *General Industrial Society Ltd.* v. *Commissioner of Labour*[1], this Court has observed—

"Before that Court, the decision of the Supreme Court above referred to was relied on by the employer, but the Court held that section 25-M is not *in pari materia* with section 25-O, which was the subject-matter before the Supreme Court, that there are two points of difference between the two sections 25-O and 25-M, that section 25-M requires reasons to be recorded in writing, that it provides that permission shall be deemed to have been granted on the expiry of the period of two months and that the two points of difference are substantial, and, therefore, the decision of the Supreme Court cannot be invoked to invalidate section 25-M. With respect, we are not inclined to agree with the reasoning given by the Bench of the Andhra Pradesh High Court in the said decision. Firstly, a mere provision requiring reasons to be given cannot be taken to be a sufficient safeguard against arbitrary refusal unless guidelines are set out. Unless guidelines are there, it is not possible to find out whether the reasons given for refusal are proper and germane. Even in a case where the employer makes out a good case for retrenchment, it is possible for the appropriate authority to refuse to grant permission by giving some reasons. There is no provision in the Act to question such whimsical orders by filing appeals or revisions.... In the Andhra Pradesh case, the Court has also taken the view that there is sufficient guidelines in section 2 (*kkk*) of the Act which says when there can be a valid lay-off. With respect, we are not inclined to agree. As we have already said, even in a case where the employer had made out a case for a valid lay-off as provided in section 2 (*kkk*), the authority may refuse the permission and there is no way of challenging that refusal under the Act."

Though the decision of the Andhra Pradesh High Court is in favour of the respondents, this Court has specifically disagreed with the said view, in the decision in *K. V. Rajendran* v. *Deputy Commissioner of Labour*[2]. After

1. (1980) 1 An.W.R. 92.
2. (1980) 2 L.L.J. 275: 94 L.W. 583.

holding that section 25-N is constitutionally invalid for the reasons given by the Supreme Court for invalidating section 25-O, the Bench has stated that the defects pointed out by the Supreme Court in section 25-O are present even in sections 25-N and 25-M. Having regard to the earlier judgment of a Division Bench of this Court in *K. V. Rajendran* v. *Deputy Commissioner of Labour*[1], with which we entirely agree, we hold that section 25-M is also constitutionally invalid for violation of Article 19 (1) (*f*) and (*g*).

14. In view of our finding that section 25-M is constitutionally invalid for the reasons pointed out by the Supreme Court for invalidating section 25-O, it is unnecessary to go into the validity or otherwise of the orders passed by the authorities and which have been impugned in some of these cases.

15. In the result, the writ appeals filed by the workmen against the judgment of Mohan, J., are dismissed and the writ petitions filed by the employers are allowed. There will, however, be no orders as to costs.

16. It is represented by the learned counsel for the respondent in W.A. No. 44 of 1977, that in pursuance of the orders of this Court, a certain amount was paid to the workmen and now that the writ appeals have been dismissed the amount should be directed to be adjusted towards the future entitlements of the workman. In view of the said representation, the amount said to have been paid to the workmen by the employer can be adjusted towards future entitlements of the workman.

17. The contesting respondents seek leave of this Court for filing an appeal to the Supreme Court against the judgment just now pronounced. Since we have followed the judgment of the Supreme Court in *Excel Wear* v. *Union of India*[2], we do not think that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court. Hence the request for leave is rejected.

S.J. —— *Appeals dismissed; petitions allowed.*

1. (1980) 2 L.L.J. 275: 94 L.W. 583.
2. (1978) 2 L.L.J. 527: 1978 Lab.I.C. 1537.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and R. Sengottuvelan, JJ.*

Indian Oil Corporation Limited, Madras-2 .. *Appellant**

v.

Nainsukdas Baldeodas, by partner, Premnarain Daga, Madras .. *Respondent.*

Arbitration Act (X of 1940), section 34—Suit filed in High Court — Summons served on defendant giving two weeks time for filing written statement — Defendant failing to file written statement within two weeks—Application much later by defendant under section 34 of the Arbitration Act for stay of the suit—Application dismissed as filed beyond time—Appeal by defendant — "At any time before filing a written statement" mean at any time before the time fixed for filing a written statement—Appeal dismissed.

In a suit filed in the High Court, summons was served on the defendant on 18th September, 1979 and it stated that if the defendant intended to defend the suit, he must cause an appearance to be entered on his behalf and file in the Court a written statement within two weeks after service of summons upon the defendant. The written statement should therefore, have been filed on or before 2nd October, 1979. However, the defendant neither filed an appearance nor filed any written statement within the time fixed by the Court. On 16th November, 1979, the defendant filed a vakalat in the suit and filed an application for stay of the suit under section 34 of the Arbitration Act. The application was dismissed at having been filed beyond time. The defendant filed an appeal and contended that the words "at any time before the filing of a written statement" in section 34 referred to the factual filing of a written statement and if the defendant had not taken "any other step" in the proceeding he could file the application at any time before filing the written statement, irrespective of the fact whether the application was filed before the time prescribed for filing the written statement.

Held, "any time before filing a written statement" occurring in section 34 mean at any time before the time fixed for filing a written statement. The application was beyond the period prescribed under section 34 of the Act and it was liable to be dismissed.

[*Paras.* 3 *and* 5.]

Cases referred to:—

Shroff Bros. v. *Bisheshwar Dayal,* A.I.R. 1974 Cal. 352; *Hindustan Aluminium Corporation Ltd.* v. *Nainsukhdas, Baldeodas,* (1976) 2 M.L.J. 223: 89 L.W. 229.

Appeal under clause 15 of the Letters Patent against the order of Sathiadev, J., dated 27th November, 1980 in Appln. No. 941 of 1980 in C.S. No. 333 of 1978.

King and Patridge, for Appellant.

P. V. Subramaniam, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the order in Appln. No. 941 of 1980 in C.S. No. 333 of 1978, dismissing the application for stay of the suit under section 34 of the Arbitration Act.

2. The summons in the suit was served on the defendant on 18th September, 1979. The summons stated that if the defendant intended to defend the suit, he must cause an appearance to be entered on his behalf and file in the Court a written statement stating the grounds of his defence "within two weeks after service of this summons" upon the defendant in which case the suit will be entered in the general list of causes. The written statement should, therefore, have been filed on or before 2nd October, 1979. The defendant neither entered appearance nor filed any written statement within the period prescribed under the summons, but it filed a vakalat in the suit along with Appln. No. 941 of 1980 on 16th November, 1979 praying for stay of the suit on the ground that there is an arbitration agreement between the parties in respect of the claim in the suit. The plaintiff resisted this application on two grounds. Firstly, it was contended that the application should have been filed within two weeks of

*O.S.A. No. 133 of 1981.
29th October, 1981.

service of summons, that is, on or before the last date for filing the written statement and that its inaction in not filing the written statement will not extend the period of limitation. Secondly it was contended that under clause 9 of the contract, which is claimed to be the arbitration clause, and which reads "any dispute arising out of this sale order will be referred to the Material Manager of the defendant-company", that in this case it is this Material Manager of the defendant-company who had rejected the claim of the plaintiff before the suit was filed and that, therefore, no useful purpose would be served by referring the matter for arbitration. The learned single Judge who heard the application held that the application has been filed beyond the period prescribed and that, therefore, the application is liable to be dismissed though he was willing to accept the contention of the defendant that they were ready and willing to have the dispute referred to arbitration.

3. Section 34 of the Arbitration Act reads as follows:—

> "Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

The learned counsel for the appellant contended that the words "at any time before the filing of a written statement" refers to the factual filing of a written statement and if the defendant had not taken "any other step" in the proceeding it could file the application at any time before filing the written statement irrespective of the fact whether the application was filed before the time prescribed for filing the written statement. The learned counsel also contended that if the date before which he had to file the application is to be determined with reference to the date of filing the written statement fixed in summons the section could not be applied uniformly throughout the country as each of the Courts has prescribed different times for filing the written statement. According to the learned counsel though this Court in the summons normally fixes a period of two weeks from the date of service in filing the written statement, the same procedure is not followed in the other Courts and in some of the summonses in the suits, a period of four weeks and more is also prescribed for filing the written statement, so much so, in order to have a uniform pattern of understanding the limitation, the provision will have to be understood with reference to the actual filing of the written statement subject, of course, to the other condition that the defendant had not taken any other step in the proceeding within the meaning of the section. We are unable to agree with this contention of the learned counsel. "Any time fixed before filing a written statement" occurring in section 34 in our opinion mean at any time before the time fixed for filing a written statement. Otherwise, it would be putting a premium on defaulters. If a person had merely entered appearance and asked for time for filing a written statement, it is admitted and also covered by authorities that he would be deemed to have taken a step in the proceeding and, therefore, no application for staying the suit could be filed. By defaulting to appear on that date he would not be given any privilege to file such an application merely on the ground that he had chosen to default and not to file a written statement or take time for filing a written statement. The period contemplated under section 34 has to be a definite period and it cannot be measured with reference to the time taken by the defendant to come and appear in Court. The argument of the learned counsel would imply an unlimited period till he chose to file an application.

4. A direct question came up for consideration in the decision reported in *Shroff Bros. v. Bisheshwar Dayal*[1]. In that case also, the summons together with a copy of the plaint was served on 19th November, 1969, and the

1. A.I.R. 1974 Cal. 352.

summons had fixed 28 days from the date of service as the time within which the written statement will have to be filed. The defendant did not appear on the date prescribed in the summons for filing a written statement, but long later on 6th March, 1970, he filed his appearance along with an application for stay under section 34 of the Arbitration Act. Dismissing the application, the Calcutta High Court held:—

> "In order to enable the Court to grant stay the petitioner must make the application within the said period, that is, before the expiry of the time for filing the written statement. It is now well-settled that if the applicant makes an application for extension of time to file written statement that becomes a step in the proceeding and that also goes against the readiness and willingness of the petitioner at the time of making the application for stay or at the time of the hearing. It is true that the section provides that applications for stay under section 34 can be made 'at any time before filing of written statement'; that in my view fixes the time upto the last date fixed for filing of the written statement under the provisions of the Rules of the Original Side, which I have mentioned before. Otherwise, the petitioner would simply wait till the date of expiry and without making any application for extension of time to file the written statement formally, get extension if it is permitted to make an application under section 34 of the Arbitration Act, 1940, beyond that, as if the time has not expired or it has been by necessary implication extended by Court. That, in my view, would be extending the meaning of the words 'at any time before filing of written statement' in section 34 of the Arbitration Act, 1940. In my view, what is required under the section is that the application for stay must be made promptly and before the last date fixed for filing of the written statement under the provisions of the Civil Procedure Code, or the rules of this Court. It would not be a correct application of the said section 34 of the Arbitration Act, if an application is entertined after the expiry of the time for filing of the written statement, because on principle there is no difference between a formal application for extension of time to file the written statement or allowing the time for filing the written statement to expire and then make an application for stay under section 34 of the Arbitration Act, 1940. A defendant who has been served with a writ of summons along with the plaint must file his written statement within the time, fixed under the Civil Procedure Code, or rules of this Court for filing its written statement. Beyond the time so fixed he must make an application to the Court for getting the extension of time to file written statement which the Court may allow or not, in the facts and circumstances of each case. So, in my view, making the application for stay beyond the time fixed for filing the written statement by the writ of summons served on the defendant implies an application for extension of time to file the written statement which has already expired. That is an absurd position and the petitioner must be said to be debarred from getting any order for stay under section 34 of the Arbitration Act, 1940 if it makes the application after the expiry of the time for filing the written statement."

A learned single Judge of this Court in the decision reported in *Hindustan Aluminium Corporation Ltd.* v. *Nainsukhdas Baldeodas*[1], quoted this case with approval though the decision was actually decided on another point. We are in entire agreement with the reasonings of the Calcutta High Court. As the learned single Judge put it, if the defendant cannot ask for extension of time for filing a written statement, he would be bound to file this application for stay within the period granted for filing a written statement.

5. For the foregoing reasons, we agree with the learned single Judge that the application was beyond the period prescribed under section 34 of the Act and that it was liable to be dismissed. The appeal accordingly fails and it is dismissed with costs.

6. The learned counsel for the appellant prayed for leave to appeal to the Supreme Court. Though there is no direct decision of the Supreme Court on this point, no Court has so far taken any view different from that

1. (1976) 2 M.L.J. 223: 89 L.W. 229.

which was taken in *Shroff Bros.* v. *Bisheshwar Dayal*[1]. We are also not satisfied that the proposed appeal to the Supreme Court involves any substantial question of law of general importance which in our opinion has to be decided by the Supreme Court. The leave prayed for is, therefore, not granted.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

M. Devaraja Padayachi .. *Petitioner**

v.

The District Revenue Officer and another .. *Respondents.*

Tamil Nadu Land Reforms (Disposal of Surplus Lands) Rules (1965), *rules* 10, 11—*District Revenue Officer exercising appellate powers under rule* 10—*Cannot subsequently exercise* suo motu *powers.*

In such of those cases where the appellate power had been exercised by the District Revenue Officer (appellate authority), he would be precluded from exercising *suo motu* powers. [*Para.* 5.]

In such of those cases where District Revenue Officers come across any irregularity or inequitable orders passed, etc., it is for the concerned Authorised Officer or the District Revenue Officer to immediately bring to the notice of the Land Commissioner or the Government, which has the powers to take *suo motu* action and pass suitable orders thereon. [*Para.* 6.]

Petition under Article 226 of the Constitution for issue of a writ of *certiorari* calling for the records, relating to the order dated 30th September, 1978, issued by the District Revenue Officer, South Arcot, Cuddalore, in his proceedings under Ref. C.1.106156 of 1978 on his file and quash the order dated 30th September, 1978.

1. A.I.R. 1974 Cal. 352.

*W.P. No. 4781 of 1978.

4th August, 1981.

R. Ganesan, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents.

The Court made the following

ORDER.—Though in the affidavit filed in support of this writ petition several points have been taken, Mr. R. Ganesan, counsel for the petitioner, confines to only one point being that, the District Revenue Officer had no jurisdiction under Tamil Nadu Land Reforms (Disposal of Surplus Lands) Rules, 1965 to take *suo motu* action when he has already exercised appellate powers under rule 10 of the Rules, and hence the impugned order is without jurisdiction.

2. It is not in dispute that the District Revenue Officer had earlier dismissed the appeal prefered by the petitioner on 27th April, 1977. It is thereafter the petitioner preferred a revision to the Commissioner of Land Revenue, who by order, dated 22nd June, 1978, directed the District Revenue Officer to take *suo motu* action. A show-cause notice on 30th August, 1978, was issued by the District Revenue Officer, who had later on passed the impugned order, setting aside the order of assignment, dated 30th June, 1976. Mr. R. Ganesan, counsel for the petitioner, contends that when in a given case an appeal had been already heard by the District Revenue Officer as per rule 11 (2) of the Tamil Nadu Land Reforms (Disposal of Surplus Land) Rules, 1965, he has no jurisdiction to initiate *suo motu* action, and if circumstances warrant it, it may be taken either by the Commissioner of Land Revenue or the Government, as the case may be. He refers to rule 11 (2), it being:—

"If in a case where no appeal has been presented under rule 10, at any time within three years of the date of the order of assignment, the District Revenue Officer is satisfied that there has been a material irregularity in the procedure or that the order was grossly inequitable or that it was passed under a mistake of faot or owing to fraud or misrepresentation or that the extent assigned together with other lands, if any, held by the assignee (other than a Co-operative Society) was in excess of five

standard acres, he may set aside, cancel or in any way modify the order".

In respect of the *suo motu* powers conferred on the Land Commissioner under sub-rule (3), or on the Government under sub-rule (4) such a provision had not been made by stating that 'if in a case where a revision had been filed'; and therefore, when the three sub-rules dealing with the powers of *suo motu* to be exercised by concerned authorities had been differently worded, in respect of the District Revenue Officer, his right to initiate *suo motu* action within the period of three years, would not be available in a case where he has already exercised appellate powers.

3. Government Pleader in his turn would contend that when *suo motu* power is admittedly available with the District Revenue Officer, it is immaterial whether an appeal had been already disposed of by him or not. In short his contention is, alongside the appellate powers being exercised it would not be improper for him to exercise *suo motu* powers as well. He states that when the appellate power had been already exercised in such cases, he could exercise the *suo motu* powers, to set right any mistake committed earlier in ordering assignment.

4. The contention raised by Mr. Ganesan by reference to the opening words in rule 11 (2) has force, because, such a provision is not made in respect of *suo motu* powers exercised by the Land Commissioner and the Government. Evidently, a limited restriction had been placed on the *suo motu* powers of the District Revenue Officer, because such a provision made, excludes his right to exercise *suo motu* powers in such of those cases; in no respect the necessary or requisite powers of the other authorities to exercise *suo motu* powers, over the same matter during the same period, had not been unprovided for. In respect of the Land Commissioner, he may at any time within five years of the date of the order of assignment, exercise *suo motu* powers. Equally in a case where no appeal has been filed, within three years from the date of the order of assignment, the District Revenue Officer himself can exercise *suo motu* powers (presently called 'appellate authority'). As for Government, as per the amended rule, at any time after one year from the date of the Land Commissioner's order or within five years from the date of order of assignment, whichever is less, it can exercise *suo motu* powers. Hence, by accepting the construction put by Mr. Ganesan, in no manner, the *suo motu* powers to be exercised to set aside erroneous orders, is not deprived of, for the State.

5. A reading of sub-sections (2) to (4) of rule 11 would show that in a matter where the assignment order has been passed, and a period of three years had not elapsed, any one of the three authorities can exercise *suo motu* powers. When such a provision has been made for concurrent exercise of powers by all the three authorities, by excluding the District Revenue Officer to exercise *suo motu* powers only in such of those cases in which he has heard appeals, it cannot be claimed by the State that there is a likelihood of some of the assignees having secured orders by misrepresentation or by practice of fraud, escaping the attention of the State, and the State in turn being deprived of the powers to set aside or cancel those orders. When a specific exclusion had been made only for a specific contingency, by ascribing the normal meaning to those words, it results in the conclusion that, in such of those cases where the appellate power had been exercised by the District Revenue Officers (appellate authorities), they would be precluded from exercising *suo motu* powers.

6. In such of those cases where District Revenue Officers come across any irregularity or inequitable orders passed, etc., it is for the concerned Authorised Officer or the District Revenue Officer to immediately bring to the notice of the Land Commissioner or the Government, which has the powers to take *suo motu* action and pass suitable orders thereon.

7. Therefore, in the instant matter, when the District Revenue Officer had already exercised appellate powers he had no jurisdiction to take *suo motu* action and on this basis the impugned order passed by him is set aside and the *rule nisi* is made absolute. There will be no order as to costs.

8. The disposal of this matter would not preclude the competent authority to exercise *suo motu* powers and in doing so, the time taken during the pendency of the writ petition would be excluded.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—S. *Nainar Sundaram, J.*

Ivor Fernandez .. *Petitioner**

v.

The Management of Messrs. Stanes Motors (Southern India) Ltd., Coimbatore and another .. *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *section* 2 (s) (iv)—*Petitioner employed in a supervisory capacity and drawing more than Rs.* 500 *per mensem as wages — Petitioner within the exemption under section* 2 (s) (iv)—*Decision relating to status of the workman touches jurisdiction of the Labour Court — Decision reviewable under Article* 226 *of the Constitution—Constitution of India* (1950), *Article* 226.

The decision relating to the status of the workman which touches the jurisdiction of the Labour Court can be reviewed by the High Court under Article 226 of the Constitution of India if the error is an error of law apparent on the face of the record.

[*Para.* 3.]

The principle is now well-settled that for the purpose of finding out as to in which classification a person would fall, it has to be seen what is the main or substantial work which a person is employed to do; if it is supervisory work the person would be held to be employed to do supervisory work even though he may, be also be doing some technical, clerical or manual work. [*Para.* 5.]

Held, the petitioner was employed in a supervisory capacity and since he was drawing wages exceeding Rs. 500 per mensem at the relevant point of time, he would be hit by the exemption under section 2 (*s*) (*iv*) of the Industrial Disputes Act and hence he could not characterise himself as a workman within the meaning section 2 (*s*) of the Act and agitate for the reliefs by way of an industrial dispute under the Act.

[*Para.* 6.]

Cases referred to:—

Burmah-Shell Co. v. *Burmah-Shell Management Staff Association,* (1971) 2 S. C. R. 758: (1970) 2 Lab.L.J. 590: A.I.R. 1971 S.C. 922; *Engineering Construction Corporation Ltd.* v. *Additional Labour Court,* (1980) 2 Lab.L.J. 16: 56 F.J.R. 408.

Petition under Article 226 of the Constitution for issue of a writ of *certiorari* calling for the records in I.D. No. 55 of 1977 and quash the award, dated 1st April, 1978 etc.

P. R. Govindaswami Iyer, for *E. Venkatakrishna,* for Petitioner.

M. R. Narayanaswami, for Respondents.

The Court made the following

ORDER.—The petitioner in this writ petition claiming himself to be a workman within the meaning of section 2 (*s*) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act), raised a dispute over his non-employment by the first respondent. The dispute was referred to the second respondent and the matter was taken up for adjudication by the second respondent in I.D. No. 55 of 1977. Apart from justifying the non-employment of the petitioner on other grounds, the first respondent put forth a contention that the petitioner would not come within the meaning of 'workman' under section 2 (*s*) of the Act, because he was employed at the relevant point of time in a supervisory capacity drawing wages exceeding Rs. 500 per mensem and thus the petitioner would be excluded from the definition of 'workman'.

2. The second respondent went into the question as to whether the petitioner would come within the meaning of 'workman' under section 2 (*s*) of the Act and on an assessment of the materials placed before him, came to the conclusion that the petitioner was employed in a supervisory capacity and was drawing wages exceeding Rs. 500 per mensem and accordingly he would fall within the exemption set out under section 2 (*s*) (*iv*) of the Act. The second respondent further found that the termination of the services of the petitioner by the first respondent is tenable, since the first, respondent acted *bona fide* taking into consideration relevant factors which justified such termination. In this view the second respondent

*W.P. No. 4240 of 1978.

24th July, 1981.

passed an award dismissing the claim of the petitioner. The petitioner challenges the award of the second respondent in the present writ petition.

3. The primary question that was argued before me by Mr. P. R. Govindaswami Iyer, the learned counsel appearing for the petitioner is that the finding of the second respondent that the petitioner is not a workman within the meaning of section 2 (*s*) of the Act and he will be hit by the exemption under section 2 (*s*) (*iv*) of the Act is in ignorance of the factual materials placed in this case. It is needless to point out that the decision relating to the status of the workman which touches the jurisdiction of the Labour Court can be reviewed by this Court under Article 226 of the Constitution of India if the error is an error of law apparent on the face of the record. This obliges me to consider the question as to whether the second respondent committed any error of law when he adjudicated that the petitioner comes within the exemption under section 2 (*s*) (*iv*) of the Act. The petitioner was entertained by the first respondent at its Trivandrum branch by order, dated 13th November, 1963, marked in this case as Exhibit M-1. Exhibit M-2 is the order of confirmation passed by the first respondent, with regard to the employment of the petitioner on 21st August, 1954. The petitioner was working in different branches of the first respondent and at the relevant point of time he was working at Ooty branch of the first respondent. By Exhibit W-16, dated 1st July, 1976, the services of the petitioner were terminated by the first respondent with effect from the close of work on 5th July, 1976. The last drawn wages of the petitioner admittedly exceeded Rs. 500 per mensem. Exhibits M-1 and M-2 do not throw much light on the nature of the duties allocated to the petitioner. The employment of the petitioner was in the category of a foreman. Exhibit M-2 among other things, states as follows:—

"You are expected to manage the workshop side of our business thoroughly and efficiently to the satisfaction of the management and our valuable customers without any complaints. You are to carry out all instructions and directions given to you by the management from time to time and all jobs are to be taken up only after getting the permission. You are responsible to look after the machinery and plant and tools in the workshop and with workmen".

Exhibit M-9 is dated 20th March, 1975, and it contains the list of duties assigned to the petitioner for his general guidance. Exhibit M-9 reads as follows:—

"Consequent to your posting to Ootacamund as foreman, the reasons for which have already been clearly indicated to you vide our transfer order No. DO 438, dated 7th March, 1978. We hereby append below the list of your duties for your general guidance. In addition to these the management reserves the right to utilise your services in any fashion and in any capacity as they deem fit depending on exigencies of work.

1. As a foreman, you will be generally in charge of maintenance of the shop floor cleanliness and discipline. To achieve this object, first of all you must discipline yourself as indicated in our director's letter No. JAK|844, dated 8th June, 1971.

2. You shall not take leave or absent yourself which are not in accordance with the leave rules of the Company. As your services may be required at any time due to exigencies of work, only after getting prior permission from the Branch Manager you will proceed on leave. The Branch Manager has the right to cancel your leave applied for and ask you to report for duty if there is any emergency due to exigencies of business.

3. You will test the vehicles and for this purpose a test report form is enclosed herewith. This form must be maintained and submitted to the Branch Manager weekly for his scrutiny and remarks. The testing time alone per vehicle should not exceed 15 minutes at anytime whatsoever.

4. Before sub-contracting jobs for mechining or painting etc., you must consult the Branch Manager, get his approval first and only then proceed.

5. You will talk to the customers with patience and politeness and on no account there should be complaint from customers for rude behaviour, careless answering etc.

6. You will conduct yourself in a good manner both with the staff and workers so that there will be no complaint whatsoever about your behaviour from anybody.

7. On no account you should disclose any failure etc., on new vehicle to customers or involve in anti propoganda as it will affect the reputation of the company. If there should be any such instance brought to our notice, disciplinary action will be taken against you.

8. You should be punctual in attending to your duties as that expected of you.

9. You will report to the Branch Manager daily and keep him appraised of the progress in the workshop from time to time.

10. You will assure that all vehicles coming in have a job card made out and before delivery consult the billing department and effect delivery of the vehicles after attention in consultation with and approval of the Branch Manager.

11. You have no right to decide whether any repairs should be done free of charge etc., except that you can put in your recommendations to the Branch Manager.

12. On no account, you will interfere with the billing department or inform the customers and release the vehicles assuming that the repairs are free of cost. If there is any such instance, such cost of repairs etc., is likely to be deducted from the salary payable to you.

13. Above all, it is most important that you strictly obey the orders of the Branch Manager and co-operate with him to the utmost extent to achieve the desired results without putting forth excuses.

You are hereby required to acknowledge receipt of this letter and confirm having noted the instructions by signing and returning the duplicate copy to the Branch Manager for onward transmission to this Office".

Exhibit M-13 is a letter from the Branch Manager Ooty, of the first respondent to the petitioner and it is dated 2nd January, 1976, and this letter sets out detailed instructions as to the discharge of the duties by the petitioner. Exhibit M-13 reads as follows:—

"This is to confirm the discussions the writer had with you today regarding the existing procedures adopted in the workshop and also regarding the labour turnover achieved so far. As pointed out during the discussion, your primary responsibility will be to supervise all repair activities of ears, trucks, tractors and motor cycles and to clear off the old defects and achieve the labour sales target laid for the branch for this year ending March, 1976.

In the process of discharging your duties you will have to road-test vehicles before and after repairs, allot work to men, handle them tactfully and get the best out of them. Customers satisfaction is our aim and this is to be achieved with a team effort and you should set an example by politely and, courteously handling the customers. You will report to the undersigned the day to day activities of the workshop, progress of work and your suggestions in improving the quality of work and turnover will be given due attention.

Since, there has been some complaints in the past regarding the activities in the workshop, with effect from 5th January, 1976, you are instructed to strictly implement the following—

1. You will arrange for: (*i*) complete cleaning of the shop floor, segregating the scraps from usable materials; and (*ii*) making on the bays for cars, trucks, tractors and motor cycles in line with the discussions the writer had with you, before 5th January, 1976.

2. You will take out a list of available tools with the mechanics and otherwise and also list out your barest minimum requirement of tools and submit to the undersigned before 10th January, 1976.

3. Only you should road-test the vehicles and trade plate must be used. In case the trade certificate is otherwise engaged only on those occasions and if road testing is absolutely essential you may take out the vehicle for trial for a short run with utmost caution.

4. Only stipulated trial route should be used and the road testing form will have to be duly filled in for every vehicle. Consi-

dering the cost of petrol trial runs must be made only if necessary and that too diagnosing must be done in a short run as far as possible.

5. In your absence, mechanic Krishnan can be asked to look after the shop and also to road test vehicles.

6. When the vehicle is taken out for a trial run only one assistant is to be taken and only if absolutely essential the mechanic should go.

7. As far as possible direct contact between mechanics and the customer is to be avoided and the workshop staff should meet and take care of the customers.

8. A separate work allocation is issued for Mr. Reghuraman and Mr. Cyril Rozario and you are expected to supervise and co-ordinate their activities.

9. You should attempt to take in other makes of vehicles than Ambassadors and also entertain more repairs of trucks.

10. Your request for more men in receiving our attention and this will be justified if you show substantial improvement only in labour turnover.

11. You must be fully conversant with the latest service bullentin issued by our principals and you must educate mechanics.

With your background and your service in the organisation, the Management hopes that you will rise up to the occasion and your performance will be watched with interest during the ensuing months."

4. The second respondent considered these documents along with the other documents placed by the parties and summed up the principal and main duties of the petitioner as a foreman as follows:—

1. The general control and supervision over workers of the department.

2. Allocation and re-allocation of work to workers.

3. Instructing the workers as to how to proceed with the work of repair or maintenance of the vehicles; guiding them as to how the job is to be done; and giving them necessary directions.

4. Going round the shop floor to see how the jobs are being done by the workmen, inspect the progress made, ensuring that repair Schedules are adhered to and instructing change of parts.

5. Reporting on the performance of the workmen under him to superiors for necessary action.

6. Recommending sanction of leave to the workers.

7. Making suggestions to the management regarding possible improvements in the upkeep and maintenance of the shop floor and about the performances and potentialities of the workmen."

5. The petitioner examined himself as W.W. 1 and he stated that his main works were wheel aligament, brakes and engine tuning and incidentally he had to supervise the work of other workmen. He did not dispute the correctness of the allocation of duties as set out in Exhibits M-9 and M-13. Apart from the *ipso dixit* of the petitioner as W.W. 1, nothing is brought out from records that the petitioner was principally and substantially discharging the work of a mechanic in the services of the first respondent. The learned counsel appearing for the petitioner is not in a position to dispute the summary of the principal and main duties as set out above made by the first respondent. In *Burmah Shell Co.* v. *Burmah Shell Management Staff Association*[1], the Supreme Court points out that the principle is now well-settled that for the pupose of finding out as to in which classification a person would fall, we have to see what is the main or substantial work which that person is employed to do; and if it is supervisory work it would be held that the person was employed to do supervisor's work even though he may be also be doing some technical, clerical or manual work. In that case the Supreme Court was examining the question as to whether a foreman (Chemicals) under the management in that case would come within the category of a workman or he would fall within the exception under section 2 (*s*) (*iv*) of the Act. The following observations found at pages 603 and 604 of the Report are worthwhile noting:—

1. (1970) 2 L.L.J. 590: (1971) 2 S.C.R. 758: A.I.R. 1971 S.C. 922.

"The Foreman (chemicals) examined is M. D. Daniel. The claim of the Association was that he was employed essentially to do technical and manual work. In his evidence, he first described the work done by a chemist which was a post held by him earlier. Giving the duties of the foreman (chemical) he stated that the main part of his duties as foreman is to be responsible for the blending of the chemicals. He admitted, that the work of packing, capping and filling is done by labourers under his supervision. He himself makes only random checks in order to ensure that the labourers are doing the work properly. He admitted that he allots the work to the workmen under him who are 20 in number. Further, he had another 20 workmen under him for filling of furnace oil. Though he denied that he was responsible for their discipline, he admitted that he makes reports to the officer in charge, chemicals whenever an occasion arises. He signs gate passes and material vouchers. He recommonds promotions of the men working under him and he is entitled to select a person for acting in a higher capacity for the day when the person occupying the higher job is absent. It is his duty to ensure utilisation of man-power. Like Nathai, he also signed chits for leave not exceeding 18 days as I|C department; but he has also pleaded that this signature was made in token of recommendation and not sanction. The workmen working under him in the chemical department include checkers, general workmen, packers and chemical mixers. These duties, which are performed by Daniel, on the face of it, are primarily and substantially those of a supervisory nature. His own manual work is only incidental and forms a small part of his duties. In dealing with his case, the Tribunal got slightly mixed up inasmuch as the facts relating to duties of chemists were also taken into account. Daniel who is now foreman (chemicals) was earlier a chemist. The work performed by a chemist should not, therefore, have been taken into account when determining what work Daniel is employed to do. The duties mentioned above clearly show that his principal duties are of a supervisory nature and the manual work done by him personally is only incidental. Since he also draws a salary in excess of Rs. 500 per mensem, he must be held not to be a workman under Exception (*iv*)."

6. The facts of the present case are more or less similar to the case dealt with by the Supreme Court. The learned counsel for the petitioner submits that the petitioner has been trained with regard to certain techniques connected with repairs of motor vehicles and this is evident from Exhibits W-13 and W-14 and hence the workman must be deemed to have discharged principally the duties of a workman in the category of a mechanic. A reading of these documents does not convey any such meaning. Exhibits M-9 and M-13 taken along with other documents considered by the second respondent in detail, leave no room for doubt, that the petitioner was principally and substantially discharging the work of a supervisor, though he had the nomenclature of a foreman. The learned counsel for the petitioner draws my attention to the judgment of a Division Bench of this Court consisting of Ramanujam and Padmanabhan, JJ., in *Engineering Construction Corporation Ltd.* v. *Additional Labour Court, Madras*[1], in support of his submission that merely because the petitioner was designated as a foreman, it cannot be concluded that he was doing work of a supervisory nature and it is the nature of the work and not the nomenclature which is the criterion for the purpose of deciding the question as to whether a person is a workman or not within the meaning of the Act. Nobody disputes this principle. But, on analysing the jurisdictional facts in this case, in my view, the conclusion has rightly been reached by the second respondent that the petitioner was employed in a supervisory capacity and since he was drawing wages exceeding Rs. 500 per mensem at the relevant point of time, he will be hit by the exemption under section 2 (*s*) (iv) of the Act and hence he cannot characterise himself as a workman within the meaning of section 2 (*s*) of the Act and agitate for the reliefs by way of an industrial dispute under the Act. Since this question is answered against the petitioner, it is unnecessary to go into the other question as to whether the non-employment of the peti-

1. (1980) 2 L.L.J. 16: 56 F.J.R. 408.

tioner by the first respondent is justified or not. In this view I do not find any warrant for interference in writ proceedings and accordingly the writ petition fails and the same is dismissed. There will be no order as to costs.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. N. Singaravelu, J.*

M|s. Children's Choice represented by its Partner Mr. Lakshmichand Shamjee
.. *Petitioner**

v.

G. K. Adiseshiah and another
.. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (c)—*Petition for eviction — Additional accommodation — Building having six shops each bearing separate door number — Landlords owning shops* 1, 2, 5 *and* 6—*Landlords in occupation of shops* 1 *and* 2—*Dispute as to shops* 5 *and* 6—*Tenant in shops* 5 *and* 6 *claiming shop to be separate buildings and petition under section* 10 (3) (c) *as not maintainable — Petition held maintainable — Landlords, purchasers from original owner in February,* 1975—*Tenant having lease agreement with the landlords'-vendor for a period of* 5 *years ending with* 31*st January,* 1975, *with an option to renew the lease for a further period of* 4 *years—Tenant exercising the option by a registered notice on* 20*th August,* 1974—*Whether petition for eviction valid in the face of the agreement — Hardship to tenant if outweighs hardship to landlord.*

In one building, there were six shops in a row, each of them bearing separate door numbers. The landlords were doing business in textiles in shops 1 and 2. They purchased shops 5 and 6 in February, 1975. They filed the present petition for eviction in July, 1977. The tenant contended that shops 5 and 6 had different door numbers, though they were in the same building and that the petition under section 10 (3) (c) of the Tamil Nadu Act XVIII of 1960, was not maintainable. The tenant had an agreement of lease with the landlords'-vendor and according to that the tenant had an option to renew the lease for a further period of 4 years from 31st January, 1975. The tenant had exercised his option by a registered notice to the original owner on 20th August, 1974. The tenant contended that in the face of this lease agreement and the option exercised by him for renewal, the petition for eviction was premature. Lastly, the tenant contended that he had established his business and if he was evicted the hardship caused to him would be greater than the hardship of the landlords. Both the Courts below ordered eviction. The tenant filed a revision to the High Court.

Held: The mere fact that the shops were separately numbered by the Corporation for purposes of assessment was not a bar for the maintainability of the application of the landlords under section 10 (3) (*c*). It could not be said that the shops 5 and 6, *viz.*, the premises in question constitute a separate building disentitling the landlord to apply under section 10 (3) (*c*). [*Para.* 2.]

The fact that there was no written agreement for the renewals of the lease deed nor that there was no registration of the same would not take away the right of the tenant to continue the lease, as per the original contract of tenancy. The present landlords themselves were fully aware of the contract between the original owner and the tenant for a further renewal of four years from 1st February, 1975, and they had purchased the property with knowledge of the same. Therefore, the subsequent purchasers could not ignore the previous agreement of their vendor and seek to evict the tenant when the latter had exercised his option in writing. Thus, this petition for eviction filed in July, 1977, before the expiry of the period of four years was premature and was liable to be dismissed *in limine.* [*Para.* 4.]

It had been repeatedly pointed out that if the *bona fides* of the landlords had been proved, the relative hardship of the parties in the event of eviction should also be considered before ordering eviction. It was submitted that if the tenant was thrown out of the premises, his business would be ruined and the dis-

*C.R.P. No. 1993 of 1980.
23rd December, 1981.

advantages that would be caused to the tenant in the event of eviction would far outweigh the marginal advantage that might accrue to the landlords by the proposed expansion of their business. Though detailed evidence was not let in on either side with respect to their relative advantages and disadvantages, the facts stated speak for themselves and the tenant had established his business in the premises from the year 1970 and the hardship that would be caused to the tenant in the event of eviction would be relatively greater. In this view of the matter also, the landlords had to fail. [*Paras.* 5 *and* 6.]

Cases referred to:—

Veerappa Naidu v. *Gopalan,* (1961) 1 M.L.J. 223; *R. M. Mehta* v. *Hindustan Photo Films Manufacturing Company,* (1976) 1 M.L.J. 115: 89 L.W. 19: A. I. R. 1976 Mad. 194.

Petition under section 25 of Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960, as amended by Act XXIII of 1973, praying the High Court to revise the Order of the Court of the V Small Causes Court, Appellate Authority, Madras, dated 23rd June, 1980 and made in H.R.A. No. 814 of 1979 and before the Rent Controller X Small Cause Court, Madras in H.R.C. No. 2105 of 1977.

Habibulla Badsha and *Akhim Ali Badsha,* for Petitioner.

T. R. Rajagopalan and *T. R. Rajaraman,* for Respondents.

The Court made the following

ORDER.—The tenant is the revision petitioner. The respondents-landlords filed the petition for eviction in respect of two non-residential shops under section 10 (3) (*c*) of Act XVIII of 1960, for additional accommodation. The petitioner-tenant contended that the petition under section 10 (3) (*c*) is not maintainable since the premises constitute a separate building and therefore, the application should have been filed under section 10 (3) (*a*) (*iii*) of the Act. The tenant further contended that as per the terms of the contract of lease he is entitled to a renewal of the lease for four years and that the application for eviction is premature. Lastly, it was contended that in any event the requirement was not *bona fide*. The Rent Controller rejected the contentions of the tenant and ordered eviction. On appeal, the Appellate Authority confirmed the order of eviction and the tenant has come on revision.

2. Three points were raised before this Court by the tenant and I shall consider them one by one. The foremost question is whether or not the petition for eviction is maintainable under section 10 (3) (*c*) of the Act. Learned counsel for the tenant pointed out that there are six shops in that building in a row, each of them bearing separate door numbers. The landlords are running their business in textiles in shops 1 and 2. The premises in dispute are door Nos. (shops) 5 and 6. The two shops in between, namely shops 3 and 4, belong to third parties. Originally, the entire building belonged to one person who sold the shops 1 and 2 to the landlords herein, and three years later, sold shops Nos. 5 and 6 to the same landlords. Admittedly, shops 3 and 4 were sold to third parties. The premises in dispute are not contiguous to door numbers 1 and 2 and therefore, it is argued that for all purposes, they constitute a separate building and that the landlords cannot ask for additional accommodation treating them as a portion of the same building. It is common ground that the assessment and the entries in the property -tax register of the Corporation for the premises in question are separate, though they are comprised in the same building. It is also common ground that the entire building does not belong to the respondents-landlords, since shops 3 and 4 were admittedly sold to third parties who are in occupation of the same. Both the Courts below found that since the shops in question are also situated in the same building, the landlords are entitled to file a petition under section 10 (3) (*c*) for additional accommodation. For this proposition, reliance was placed by the landlords on the decision reported in *Veerappa Naidu* v. *Gopalan*[1], Therefore, the mere fact that the shops are separately numbered by the Corporation for purposes of assessment is not a bar for the maintainability of the application of the landlords under section 10 (3) (c). It cannot

1. (1961) 1 M.L.J. 223.

be said that the shops 5 and 6, *viz.*, the premises in question constitute a separate building disentitling the landlord to apply under section 10 (3) (*c*). I agree with the findings of the lower Courts on the question of maintainability.

3. I will now take up the other point, namely, that the tenant has exercised his option for renewal of lease as per the terms of the lease deed and therefore, the present petition for eviction is premature. It is common ground that the tenant entered into possession by virtue of a written lease deed executed in favour of the landlords' vendor on 26th January, 1970, for a period of five years ending with 31st January, 1975, with an option to renew the lease for a further period of four years. Before the expiry of the period of five years of lease, the tenant had exercised his option in writing to the vendor of the landlords on 20th August, 1974. The landlords purchased the premises only in February, 1975. Exhibit R-4 is the registered notice sent by the tenant to the original landlord Sankaran on 20th August, 1974, clearly expressing that the tenant wanted to continue the lease and renew the same for a further period of four years in accordance with clause 14 of the contract of lease. The original landlord did not respond to this registered letter, but sold away the property to the landlords herein sometime in February, 1975. The previous owner had promptly collected the rent upto February, 1975 and then, under Exhibit R-6 dated 19th March, 1975, directed the tenant to attorn the tenancy in favour of the purchasers, *viz.*, the present landlords. Exhibit R-8 is an earlier letter dated 24th February, 1975, by the original landlord to the tenant to the same effect. After purchase, the present landlords sent a notice under Exhibit P-1 on 5th January, 1977, calling upon the tenant to vacate the premises on the ground of requirement for own occupation. It is important to note that in this lawyer's notice. Exhibit P-1, the present landlords have clearly admitted that there was an agreement for renewal of the lease for a further period of four years between the original owner and the tenant, but that the tenant had not expressed his desire to renew the lease for a further period. This was promptly repudiated by the tenant in his reply notice, Exhibit P-3, reiterating that he had already expressed his desire in writing to the original owner to renew the lease and that he had exercised his option even on 20th August, 1974. The tenant further stated that, by virtue of the clause for renewal in the contract of lease with the original owner, the lease had been renewed from 1st February, 1975 till 31st January, 1979, for a period of four years and therefore, the landlords cannot ask for eviction during that period. The landlords, however, ignored the same and filed this petition for eviction in July, 1977. These facts are not in dispute and they are gathered from the evidence on record.

4. Learned counsel for the tenant strenuously contended that in view of the renewal clause in the lease agreement and in view of the fact that the tenant had exercised his option in writing before the period of expiry of the tenancy, the tenancy stands renewed and therefore, the present petition filed within the renewal period of four years is premature. Both the Courts below found that inasmuch as the renewed lease deed had not been executed or registered, the tenant is not entitled to protection. Learned counsel for the landlords drew my attention to a ruling of this Court in *R. M. Mehta* v. *Hindustan Photo Films Manufacturing Co.*[1], for the proposition that the renewal document of lease should not only be executed but also be registered. I have perused that decision and I am of opinion that the facts of the case are not applicable to the case on hand. That was a case arising under the Transfer of Property Act, where the lessee was sought to be made liable for damages even after the lessee had vacated the premises. The question that arose for consideration in that case was whether the renewed lease came within the scope of section 107 of the Transfer of Property Act, and in that context it was considered that such a lease should be made only by a registered instrument so as to make the lessee liable for damages. In the instant case, the tenant had exercised his option in writing and had written to the previous landlord calling upon him to renew the lease deed before the expiry of the lease period, and the

1. (1976) 1 M.L.J. 115; 89 L.W. 19: A.I.R. 1976 Mad. 194.

landlord had acknowledged the same by his acknowledgment, Exhibit R-5, and there was no response. He seems to have waited till the expiry of the period of lease, namely 31st January, 1975, and thereafter sold the property to the present landlords. Now, the tenant has done his part of the contract and has exercised his option in time. If the absentee landlord, namely the previous owner residing at Bangalore, had sold away the property ignoring his own covenant, it will not destroy the right of renewal of lease created under a contract of lease. It is unreasonable to expect that an absentee landlord who wants to sell away the property would execute a renewal lease deed displeasing the purchasers and also destroying the prospects of sale. Similarly, the present landlords, who had purchased the property with notice of the contract of lease for renewal would not have cared to respond nor execute a renewal of lease agreement, let alone registering the same. Therefore, the fact that there is no written agreement for the renewal of the lease deed nor that there was no registration of the same will not take away the right of the tenant to continue the lease, as per the original contract of tenancy. The present landlords themselves were fully aware of the contract between the original owner and the tenant for a further renewal of four years from 1st February, 1975, and they have purchased this property with knowledge of the same. Therefore, the subsequent purchasers cannot ignore the previous agreement of their vendor and seek to evict the tenant when the latter had exercised his option in writing. Thus, this petition for eviction filed in July, 1977, before the expiry of the period of four years is premature and is liable to be dismissed *in limine*. Both the Courts below have not seriously considered the claim and the rights of the tenant and, in this view, the orders of eviction are vitiated by material irregularity and impropriety. Consequently, it follows that the petition for eviction itself cannot stand.

5. The last point for consideration is whether the requirement of the landlords for additional accommodation under section 10 (3) (c) of the Act is *bona fide*. As already stated, the respondents (landlords) are brothers and are carrying on partnership business in textiles in shops 1 and 2 and they require the shops in question, *viz.*, shops 5 and 6 in the occupation of the tenant for additional accommodation. According to the landlords, who are brothers, they want to expand their business and to have separate business for each one of them. The two Courts below found that the requirement is *bona fide*. The landlords have also produced some documents to show that their business has since expanded—*Vide* Exhibits P-4 to P-10, assessment orders of the Commercial Tax Department. This Court sitting in revision does not want to interfere with the findings regarding the *bona fides*, though it is strenuously contended on behalf of the tenant that the present two shops in the occupation of the landlords are quite sufficient and adequate for their business. But then, there is the more important point for consideration before ordering eviction and that is the relative hardship to the parties herein. The two Courts below have not considered this aspect seriously and they have disposed it of without any discussion worth-mentioning. The proviso to section 10 (3) (c) of the Act runs thus:—

"......Provided that, in the case of an application under clause (c), the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord." This Court has repeatedly pointed out that even if the *bona fides* of the landlords have been proved, the relative hardship of the parties in the event of eviction must also be considered before ordering eviction. Inspite of it, the lower Courts have not seriously adverted to it and have just made a passing reference and disposed it of very lightly.

6. Learned counsel for the tenant strenuously contended that the tenant has established his business in the premises during these eleven years and that Exhibit R-9, assessment order of the Commercial Tax Department shows that the present turnover of the tenant in respect of his shop dealing in Children's wear is about 4½ lakhs in the year 1977. It is argued that this turnover has since vastly expanded and that he has specialised in selling children's wear, as the name of the shop "Children's Choice" itself indicates. It is

submitted that if the tenant is thrown out of the premises, his business will be ruined and that the disadvantages that will be caused to the tenant in the event of eviction will far outweigh the marginal advantages that may accrue to the landlords by the proposed expansion of their business. Though detailed evidence was not let in on either side with respect to their relative advantages and disadvantages, the facts stated supra speak for themselves and the tenant has established his business in the premises from the year 1970 and the hardship that will be caused to the tenant in the event of eviction will be relatively greater. In this view of the matter also, the landlords have to fail.

7. The result is, the orders of eviction passed by the lower Courts are set aside, the civil revision petition is allowed and the petition for eviction, H.R.C. No. 2105 of 1977, will stand dismissed. No costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Sathiadev, J.*

Mohamed Nachiar .. *Petitioner**

v.

The District Registrar, Chidambaram .. *Respondent.*

Stamp Act (II of 1899), sections 33, 62—Document presented for registration — Document impounded for deficit duty — Document not returnable till deficit duty is paid.

When a Public Officer, on receipt of a document, particularly when it is for registration, is of the opinion that the duty paid is insufficient and impounds the document, thereafter, unless the deficit stamp duty is paid, it will not be open to the executant to seek for the return of the document as if it is not an executed document and that the executant has only asked for opinion to be given as to what would be the required stamp duty payable on the instrument. [*Para.* 4.]

Under the provisions of the Stamp Act, any person executing an instrument bearing deficit duty is liable to be prosecuted under section 62 of the Act and hence, after a document is impounded and the procedure under section 33 having been put into force, the liability to pay stamp duty cannot be avoided by an executant of an instrument under the provisions of the Act. [*Para.* 7.]

Case referred to:—

Government of Uttar Pradesh v. *Modh. Amir,* (1962) 1 M.L.J. (S.C.) 170: (1962) 1 An.W.R. (S.C.) 170: (1962) 1 S.C.J. 436: (1962) 1 S.C.R. 97: A.I.R. 1961 S. C. 787.

Petition under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for records relating to the respondent's I.N. No. 4 of 1979-A1, dated 3rd May, 1979 and quash the same.

T. V. Balakrishnan, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondent.

The Court made the following

ORDER.—The petitioner herein presented a document of the year 1978 to the Sub-Registrar, Portonovo, claiming that she was the owner of certain properties in Sirkali and Chidambaram taluks and in 1965, she had created a wakf dedicating all the properties for charitable purpose and in the year 1978, she executed the document in question providing for appointment of mutavalli to succeed her and the same was presented to the Sub-Registrar on 1st June, 1978. Thereafter, the Sub-Registrar referred the document to the District Registrar, Chidambaram, who has been invested with the powers of the Collector under the Indian Stamp Act (II of 1899) (hereinafter referred to as 'the Act') and that he had to take a decision as to whether the document is a settlement requiring stamp duty under Article 58 of the Act or otherwise. Since the document was presented before the Sub-Registrar, Portonovo, a Public Officer, for registering the instrument, the Sub-Registrar has impounded the document under section 33 (1) of the Act and sought for guidance of the District Registrar under section 38 (2) of the Act. It was considered

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*W.P. No. 2266 of 1979.
20th October, 1981.

by the District Registrar, being the respondent herein, that the instrument calls for payment of deficit duty and penalty under section 40 (1) (*b*) of the Act, and therefore, the petitioner was called upon to pay the deficit duty of Rs. 1,889. It is at that juncture, the petitioner sought for withdrawal of the document, which was refused. Hence, the present writ petition by the petitioner.

2. Mr. T. V. Balakrishnan, learned counsel for the petitioner, would at the outset state that, when the executant of the document has the right to seek for withdrawal, there being no specific provision made either in the Act or in the Rules thereunder, the public authority is bound to return the document and it is not open to him to insist on payment of stamp duty and compel him to have the document registered. In essence, his contention is, no person, who is not desirous of having the document registered, can be compelled by the registering authority to complete the registration, and if at all stamp duty is to be paid, it will be payable only if the document is to be registered. When the petitioner had already expressed her desire not to have the document registered, the Sub-Registrar is duty bound to return the document. In support of this contention, he relied upon not only the provisions of the Registration Act, but also rule 29 of the Rules framed under the Act, which provides that, if the registration fee is not paid in respect of an impugned document which has been received from the Collector, then the presenter would not be entitled to have the registration completed as provided under rule 29 (4) of the Rules. Though these rules do not provide for the return of the document, as an analogy he referred to the Rules framed by the Uttar Pradesh Government. The present case is not concerned with payment of registration fees, but the duty payable under the Act and therefore, the need to rely upon any of the provisions of the Registration Act or the Rules framed thereunder, does not exist and it is too premature to deal with the situation which may develop under the provisions of the said Act.

3. When the present claim is confined only to the payment of stamp duty, and after the document is impounded, whether the petitioner can ask for the return of the document, is the main point to be considered. The respondent has sworn to in the counter-affidavit that the Sub-Registrar has impounded the document. This claim was refuted by the petitioner, which resulted in the file being produced into Court and they show that the Sub-Registrar has (முடக்கு) impounded the document, and the document has been then sent to the respondent. Therefore, when neither the provisions of the Act nor the Rules framed thereunder envisage return of the impounded document without payment of the stamp duty whether by relying upon section 31 of the Act, can the petitioner seek for return of the document alone, has to be looked into. As soon as the document was received, while forwarding it to the respondent, the statement accompanying the document itself mentions in column 3, that it has been impounded on 23rd February, 1979.

4. Mr. Balakrishnan refers to the decision in *Government of Uttar Pradesh* v. *Mohd. Amir*[1], which dealt with a situation which arose under section 31 of the Act. Therein it was held that if a document is presented to the Collector for adjudication as to the proper stamp duty, then even in respect of instruments which have been executed, the Collector can only determine the duty and he cannot treat it as a completed document demanding compulsive payment of stamp duty. This decision could be of no assistance to the petitioner, since the petitioner herein has presented the document not, for adjudication under section 31 of the Act but for registration treating it as an executed document and the escaped stamp duty had come to the knowledge of the public officer before whom it was presented. The Sub-Registrar, Portonovo, is a Public Officer who could come within the scope of section 33 (1) (*a*) of the Act. Therefore, when a Public Officer, on receipt of a document, particularly when it is for registration, is of the opinion that the duty paid is insufficient and impounds the document, thereafter, unless the deficit stamp duty is paid, it will not be open to the petitioner to seek for the return of the document as if it is not an executed document and that the petitioner has only asked for opinion to be given as to what would be the required stamp

1. (1962) 1 S.C.J. 436: (1962) 1 M.L.J. (S.C.) 170: (1962) 1 An.W.R. (S.C.) 170: (1962) 1 S.C.R. 97: A.I.R. 1961 S.C. 787.

duty payable on the instrument. Though Mr. Balakrishnan would persuasively plead that the petitioner is a lady, aged more than 85 years, and that there was no need for her to execute a settlement as such, and even the terms of the document do not make it a settlement deed, and that she is not possessed of sufficient funds to pay stamp duty, once an executed document is presented to a registering authority and he proceeds to impound the document, there being no provision made for return of such an impounded document without collection of the stamp duty, which has already visited upon it, and furthermore, there being provision made under section 31 of the Act, for adjudication of stamp duty under different circumstances, it has to be held that once a document is impounded, the executant of the document is bound to pay the stamp duty, whether he or she desires further to register the document or not.

5. It is not the registration of the document which is a relevant factor to be taken into account for payment of stamp duty. Even after payment of stamp duty, a document may not be registered and parties may not be desirous of registering it. Hence, the incidence on the liability to pay stamp duty having already arisen by the document being executed and impounded, it cannot be avoided once it is a document which falls within the scope of Chapter IV of the Act.

6. The Government Pleader relies upon section 62 of the Act to contend that an executant of a document with deficit duty can be prosecuted. It goes to show that as soon as a document is executed, the liability to pay proper stamp duty thereon has already occasioned.

7. In the instant case, when the document has been admittedly executed and also presented for registration it will not be open to the petitioner to claim as if the document has been presented for adjudication or even otherwise she can demand return of the document which belongs to her, without paying stamp duty. Under the provisions of the Act, any person executing an instrument bearing deficit duty is liable to be prosecuted under section 62 of the Act and hence, after a document is impounded and the procedure under section 33 having been put into force, the liability to pay stamp duty cannot be avoided by an executant of an instrument under the provisions of the Act. It is in this view, this writ petition is liable to be dismissed.

8. In the counter-affidavit it is stated that the petitioner ought to have filed a revision petition to the Board of Revenue under section 56 (1) of the Act. Mr. Balakrishnan would state that the file in this case discloses that the document had already been sent to the Board of Revenue for securing the necessary opinion, but it does not preclude the petitioner to avail of the remedy which is available to her under the Act. Therefore, in the event of the petitioner filing any revision to the Board of Revenue or the successor authority as the case may be, the time taken during the pendency of the writ petition deserves to be excluded as proceedings have been initiated *bona fide*.

9. Mr. Balakrishnan attempted to place the necessary materials to contend that the document can in no sense be treated as a settlement deed. It is premature at this stage for this Court to go into the nature or the character of the document, because after the revision is disposed of by the Board of Revenue or the successor authority, in the context of the Board of Revenue having been dissolved, a right to ask for a reference to the High Court, is available under section 57 of the Act, and then alone the need may arise for interpreting the document. When such a course is prescribed under the Act, the petitioner cannot be heard to contend regarding the nature or the character of the document, and, therefore, this aspect is not dealt with in this order. In this view, for the reasons above stated, the writ petition is dismissed. No costs.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. N. Singaravelu, J.*

M/s. C. Swaminatha Mudaliar Sons, a Partnership Firm represented by one of the partners Kambikkai Mary, 101, South Masi Street, Madurai and others .. *Petitioners**

v.

S. M. Singaram and Sinniah, Executor and Administrator under the will deed, dated 18th February, 1973 of his mother M. S. M. Mannammi Achi of Pannayapatti Village, Tirumayam Taluk, Pudukkottai District and others .. *Respondents.*

*Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 11 (4)—Petition for eviction on grounds of wilful default in payment of rent and requirement for demolition and reconstruction—Landlord also filing petition under section 11 (4) — Rent Controller ordering arrears to be paid within a specified date failing which eviction petition to stand allowed — Tenants filing appeal without paying the arrears—Appellate Authority confirming the order of Rent Controller—Tenants filing revision to High Court without paying the arrears — Revision dismissed by High Court — Landlord filing E. P. before Rent Controller to execute order of eviction — Controller restoring section 11 (4) petition and posting main petition for eviction for trial—Memo. of clarification filed by landlord in the High Court—*Held *main petition stood allowed on tenant's failure to pay the arrears before the specified date as ordered by the Rent Controller.*

The landlords who filed a petition for eviction against the tenants on the grounds of wilful default in payment of rent and requirement for demolition and reconstruction, also filed a petition under section 11 (4) of the Tamil Nadu Act XVIII of 1960. To this the tenants raised various objections. Finally the Rent Controller ordered the petition under section 11 (4) and specified a date before which the tenants would have to pay the arrears of rent. However the tenants filed an appeal without paying the arrears. The Appellate Authority dismissed the appeal and confirmed the order of the Rent Controller directing the tenants to deposit the arrears. The tenants filed a revision to the High Court and did not pay the arrears. This revision was dismissed by the High Court. After this the landlords filed an execution petition before the Rent Controller. However the Rent Controller restored the petition under section 11 (4) and posted the main petition for eviction for trial. Thereupon, the landlords filed a memo. before the High Court for clarification.

Held: Inasmuch as the arrears were not paid or deposited, the order of eviction followed and that was the very purport of section 11 (4) of the Act. Therefore, it was wrong on the part of the Rent Controller to construe that the petition for eviction was still pending and that it could be inquired into on other aspects. [*Para.* 6.]

Case referred to:—

Kuppanna Chettiar v. *Ramachandran*, (1980) 1 M.L.J. 136: 93 L.W. 656: A.I.R. 1981 Mad. 35.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act, XXIII of 1973, praying the High Court to revise the Order of the Court of the Subordinate Judge (Appellate Authority), Madurai, dated 14th November, 1977 and made in C.M.A. No. 246 of 1978, I.A. No. 579 of 1977 in R.C. O. P. No. 395 of 1977-I Additional District Munsif-Rent Controller, Madurai Town.

D. C. Krishnamurthy, for Petitioners.

R. Venugopal and *V. S. Jayaraman*, for Respondents.

The Court made the following

ORDER.—The above civil revision petition was disposed of by this Court on 19th October, 1981 and the learned counsel for the landlords has filed this memo. seeking for clarification and guidance with reference to the order passed already. Notice was issued to

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*C.R.P. No. 2981 of 1979.
11th January, 1982.

the other side and learned counsel for both parties were heard.

2. The landlords filed the petition for eviction of the tenants on the ground of wilful default in payment of rent and requirement for demolition and reconstruction. During the pendency of the petition, the landlords filed an application in I.A. No. 579 of 1977 under section 11 (4) of Act XVIII of 1960, for a direction to the tenants to deposit the arrears of rent failing which, for stoppage of all further proceedings and for an order of eviction. The tenants raised all sorts of contentions, namely, that the petitioners in the eviction petition are not the landlords, that the arrears prior to the period of three years are barred by time and that the will in favour of the landlords by the original landlady has not been probated and that, there is no relationship of landlord and tenant between the parties. The Rent Controller framed five points on the averments and considered all the contentions in I.A. No. 579 of 1977 and recorded his findings in these terms:—There is relationship of landlord and tenant between the parties and the petitioners in the eviction petition are the landlords entitled to receive rent for the premises. It was also found that a sum of Rs. 37,410 was due as arrears of rent and the Rent Controller directed the tenants to deposit the said sum along with the current arrears within a prescribed time granted, failing which, the eviction petition shall stand allowed. This order was passed on 11th July, 1978. Admittedly these arrears were not paid or deposited by the tenants and the tenants prefered an appeal in C.M.A. No. 246 of 1978 against that order. The Appellate Authority also considered all the contentions of the parties in an elaborate order, discussed the case-law on the subject and confirmed the order of the Rent Controller directing the tenants to deposit Rs. 37,970 including the subsequent arrears. The tenants were aggrieved and they filed the above civil revision petition, C.R.P. No. 2981 of 1979 before this Court which also considered all the contentions raised by the tenants, namely, that the petitioners in the eviction petition are not the landlords, that there is no relationship of landlord and tenant between them and that, in any event, the landlords cannot file this petition for eviction without probating the will in their favour. The tenants also contended that they need not pay the time-barred arrears of rent and that, they were liable to pay only three years' rent prior to the filing of the petition. This Court negatived all the contentions of the tenants and dismissed the civil revision petition on 19th October, 1981, after answering all the points.

3. Learned counsel for the landlords has filed this memo. for clarification stating that after the disposal of this civil revision petition on 19th October, 1981, the landlords filed E.P. No. 719 of 1981 on the file of the District Munsif's Court (Rent Controller), Madurai for executing the order of eviction but that the Rent Controller without understanding the judgment of the High Court restored I.A. No. 579 of 1977 (filed under section 11 (4) of Act XVIII of 1960) and has posted the main petition for eviction for trial. Learned counsel submits that the order passed in the petition under section 11 (4) has become final and inasmuch as the arrears of rent were not deposited within the time prescribed, the consequential order of eviction has come to stay and therefore, the eviction petition itself is not pending. In other words, it was pointed out that the Rent Controller himself has passed the order that if the arrears of rent are not paid within the time granted by him, the petition for eviction will stand allowed. Therefore, nothing reamains to be done after the disposal of the civil revision petition (C.R.P. No. 2981 of 1979) and that the action of the Rent Controller in restoring I.A. No. 579 of 1977 as well as the petition for eviction in R.C.O.P. No. 395 of 1977 as if they are pending is without jurisdiction.

4. As against this, learned counsel for the tenants would argue that what was disposed of earlier was only the application under section 11 (4) of the Act and not that the merits of the case were considered. Therefore, it is stated that it is open to the tenants to agitate the matter in the petition for eviction which has been revived after the disposal of C.R.P. No. 2981 of 1979. It is also submitted on behalf of the tenants that they have since paid the arrears of rent and therefore, they are entitled to contest R.C.O.P. No. 395 of 1977, which according to them is still pending.

5. Section 11 (4) of Act, 1960 runs as follows:

> "If any tenant fails to pay or to deposit the rent as aforesaid (as provided under section 11 (1)) the controller or the appellate authority, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the buildings".

As stated already, in I.A. No. 579 of 1977, the tenants raised all possible contentions and the Rent Controller framed five points and recorded his findings and finally directed that a sum of Rs. 37,000 and odd should be paid within the time allowed failing which the eviction petition shall stand allowed. Admittedly, the tenants did not deposit the amount but has preferred an appeal and then a revision against the order in I.A. No. 579 of 1977. The Rent Controller has inquired into the dispute regarding the quantum of rent to be paid and, after receiving a lot of documentary evidence, determined the amount to be paid and gave the tenants time for paying it. Though section 11 (3) of the Act states that the determination is only summary in nature, the Rent Controller has gone through the question in depth and ascertained the arrears in his elaborate order. Therefore, the tenants should have deposited the determined amount into Court within the time granted as otherwise, the eviction petition will stand allowed as ordered by the Rent Controller. The fact that the tenants have taken up the matter in appeal will not help them and they should have deposited the amount without prejudice to their contentions. The Division Bench ruling of this Court reported in *Kuppanna Chettiar* v. *Ramachandran*[1], is a direct authority for the proposition that the subsequent payment of arrears will not help the tenants. Though this reported case was one arising under the Cultivating Tenants' Protection Act, the ratio is wholly applicable in this case also. The result is, the subsequent payment long after the expiry of the time granted to the tenants will not at all absolve them from the consequence of the order of eviction.

1. (1980) 1 M.L.J. 136: 93 L.W. 656; A.I.R. 1981 Mad. 35.

6. Learned counsel for the landlords urges that the Rent Controller has revived the petition for eviction and has posted it for trial and therefore, a direction to the Rent Controller by this Court will be just and proper in the circumstances of the case. It would appear that the Rent Controller has revived the petition for eviction after the disposal of this civil revision petition, C.R.P. No. 2981 of 1979 by this Court and is proceeding with the inquiry in that petition. In I.A. No. 579 of 1977, the Rent Controller himself has ordered that if the amount was not paid within a particular date, the main eviction petition will stand allowed. Inasmuch as the arrears are not paid or deposited, the order of eviction follows and that was the very purport of section 11 (4) of the Act. Therefore, it is wrong on the part of the Rent Controller to construe that the petition for eviction R.C.O.P. No. 395 of 1977 is still pending and that it could be enquired into on other aspects. Even assuming that no final order was passed on the main eviction petition, the Rent Controller has no other option but to pass the consequential order of eviction. In other words, the Rent Controller has no jurisdiction under the Act to proceed to enquire into the other aspects of the case, when the conditional order was not complied with. In other words, even if R.C.O.P. No. 395 of 1977 is kept pending by the Rent Controller, he has to pass a formal order in pursuance of the above cited decision of the High Court. In this connection, it may be pointed out that all the aspects of the case raised by the tenants have been duly considered by the three Courts in succession and the Rent Controller is bound by these findings. This clarification is accordingly issued to the Rent Controller. Time for vacating three months, since the tenant wants to move the Supreme Court.

S.J. ——— *Clarification issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Dr. Krishnamurthi Iyer .. *Petitioner**

v.

S. Govindaraja Pillai .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 10 *and* 25—*Petition for eviction—Building in Kumbakonam—Wilful default in payment of rent — Tenant afflicted by a heart condition and taking treatment in Madras—Concurrent finding of fact by Rent Controller and lower Appellate Authority of tenant suffering from heart ailment—Wilful default negatived.*

The landlord of a building in Kumbakonam filed a petition for eviction on the ground of wilful default in the payment of rent. The Rent Controller and the Appellate Authority found that the tenant was afflicted at the material time by a heart condition and had to take his treatment at Madras. Both the Rent Controller and the Appellate Authority were fully satisfied that illness of the kind which immobilised the tenant had really prevented him from attending to financial and other commitments and he would legitimately be excused when he had fallen in rent arrears. The landlord filed a revision to the High Court,

Held, concurrent findings of this kind were untouchable by the High Court in revision. [*Para.* 3.]

Taking all the facts into consideration, the Rent Controller and the Appellate Authority have entered their determination, that there was no wilful default in the payment of rent. It could not be said that they had omitted any relevant consideration or taken into account irrelevant considerations. [*Para.* 5.]

Considerations of pure legalism cannot furnish an answer to the question whether default is wilful or whether illness is a lawful excuse for non-payment of rent. Whether any default was wilful or not is a mixed question of law and fact. Whether the default is wilful in a given case must be judged fairly on the concatenation of circumstances attending on the default. [*Para.* 5.]

Case referred to:—

M/s. Sri Raja Lakshmi Dyeing Works v. *Rangaswami Chettiar,* (1980) 2 R.C.J. 165: A.I.R. 1980 S.C. 1253.

Petition under section 25 of the Tamil Nadu Act (XVIII of 1960, as amended by Act XXIII of 1973) to revise the order of the Sub-Court, Kumbakonam, dated 7th December, 1979 in C.M.A. No. 95 of 1978, etc.

K. Sarvabhauman and *S. Gopalaratnam,* for Petitioner.

N. Sankaravadivel, for Respondent.

The Court made the following

ORDER.—In this revision by the landlord of a building in Kumbakonam town, the only point for consideration is whether the Rent Controller was justified in holding that the default in payment of rent by the tenant was not wilful, since at the material time he was afflicted by a heart condition and had to take his treatment in Madras.

2. The learned counsel appearing for the landlord in this revision submitted, in the first place, that there was no evidence apart from that of the tenant himself, that he was suffering from a heart ailment. Learned counsel further submitted, that although the tenant had stated that he was taking treatment for his heart condition in a, nursing home at Madras, that did not prevent him from making a flying visit to Kumbakonam and from paying the rent. Learned counsel accordingly submitted that the Rent Controller and the appellate authority ought not to have drawn the inference that the tenant was suffering from a heart disease and that condition really prevented him from paying the rent.

3. I do not think that in this revision I can go into the question, whether on the evidence on record, the Rent Controller or the appellate authority was justified in finding that the petitioner was suffering from a heart ailment, that he was in Madras for a considerable period of time undergoing treatment in a nursing home and that owing to that disability he was prevented from making pay-

*C.R.P. No. 633 of 1980.
29th January, 1981.

ment of the rent to the landlord on the due dates. I cannot go into these findings, because as a revisional Court I have no jurisdiction to review the findings of fact of the Rent Controller, although the revisional power under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 would appear, on the surface, to confer a wider power than that which prevails under section 115, Civil Procedure Code. In a recent decision of the Supreme Court in *M/s. Sri Raja Lakshmi Dyeina Works and others* v. *Rangasami Chettiar*[1], the Supreme Court had occasion is one which had been common to both on the High Court, under section 25 is essentially a power of superintendence, and despite the wide language employed in that section, the High Court quite obviously should not interfere with findings of fact merely because it does not agree with the subordinate authority on those findings. In the present case the finding with which I am faced in this revision is one which had been common to both the Rent Controller and the appellate authority. Concurrent findings of this kind are untouchable by the High Court in revision. I must therefore, accept the findings of the Rent Controller and the appellate authority that the tenant was suffering from a heart ailment and he had to go to Madras in 1977 for undergoing treatment and he was in Madras till December, 1977, when he returned to Kumbakonam. I must accept the further findings of the appellate authority and the Rent Controller that it was this physical disability of the tenant for a long period, which was responsible for his not attending to his responsibilities as a tenant.

4. The further question which was argued by learned counsel for the landlord was that even on the footing that the tenant was suffering from a heart disease, the question is whether that could be a lawful excuse for not paying the rent on the due dates. To put the idea differently, can it be said that the default in payment of rent was not wilful default merely because the tenant was at the material time ill with a heart disease? In the present case the default was in respect of rents from August to November, 1977. On the evidence accepted by the authorities below, that he was bedridden from August to November, 1977 and that he was away in Madras, the question is whether that could be regarded as a lawful excuse, which will relieve the tenant from the consequences of the default committed by him. Learned counsel for the tenant in the course of his argument submitted that the ailment of this kind cannot justify the non-payment of rent, because the one has nothing to do with the other. He employed the familiar phrase obviously lifted from a decision of this Court that the tenant's attitude only showed 'supine indifference' to his responsibilities as a tenant. Apparently, this oft-repeated expression literally applied to this tenant who was stretched in a hospital bed with an afflicted heart.

5. It seems to me that in examining this argument, considerations of pure legalisms cannot furnish the requisite answer. I ame inclined to believe that when the tenant in this case was bedridden in Madras with a coronary condition, one cannot fairly charge him with supine indifference, although he was supine in the sense that he was confined to the bed, lying on his back, face upwards. The question whether any default was wilful or not is in my judgment, a mixed question of law and fact. It cannot be considered as raising a pure question of law. This is because what might be wilful in one set of circumstances may not be wilful in quite different circumstances. Therefore, whether the default on the part of the tenant in a given case is or is not wilful must be judged fairly on the concatenation of circumstances attending on the default. Both the Rent Controller and the appellate authority who had gone into the evidence in this case, were fully satisfied that illness of the kind which immobilised the tenant had really prevented him from attending to financial and other commitments, and he could legitimately be excused when he had fallen in rent arrears. They had particularly taken note of the fact that no sooner did the tenant return to Kumbakonam than he paid up all his arrears. Taking all the facts into consideration, the Rent Controller and the appellate authority have entered their determination, that there was no wilful default in the payment of rents. It cannot be said that they had omitted any relevant consideration or taken into account irrelevant considerations.

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1. (1980) 2 R.C.J. 165: A. I. R. 1980 S.C. 1253.

6. In the decision of the Supreme Court, which I have earlier cited, it has been held that merely to hold that a question is a mixed question of fact and law is not sufficient, without more to warrant the exercise of the revisional power. The Court proceeded to hold that it must be shown that there was a taint of such unreasonableness in the finding of the lower tribunals which resulted in a miscarriage of justice. In the present case, I cannot bring myself to hold that the inference drawn by the Rent Controller and the appellate authority from the evidence on record is or involved miscarriage of justice. It might well be that another tribunal looking at the same facts might not draw the same inference, but that can be no reason to hold that the Rent Controller and the appellate authority in this case had come to a conclusion, which is unreasonable or one which is not based on a proper instruction on the law.

7. For all the above reasons I hold that there is no merit in this revision. The revision petition is accordingly dismissed. I make no order as to costs in this revision in the peculiar circumstances of the case.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. N. Singaravelu, J.*

Sivagami Ammal and others .. *Petitioners**

v.

P. S. Elango .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 — *Petition for eviction on the ground of wilful default in payment of rent from November,* 1975 *to September,* 1976 — *Condonation of wilful default by High Court in earlier petition for eviction for the period* 1*st January,* 1973 *to* 31*st May,* 1973—*Later petition not before the High Court*—Held *condonation in earlier petition did not cover the later petition —Inability to pay rent indicates default was wilful.*

The landladies filed a petition for eviction on the ground of wilful default in payment of rent for the period 1st January, 1973 to 31st May, 1973. This went before the High Court in C.R.P. No. 1325 of 1977, wherein the High Court condoned the default by the tenant. In the meanwhile, the landladies filed another petition for eviction for wilful default in payment of rent for the period from November, 1975 to September, 1976. The tenant filed an appeal before the Appellate Authority and produced the order of the High Court in C.R.P. No. 1325 of 1977. The Appellate Authority allowed the appeal on the ground that the High Court had condoned the delays. The landladies filed a revision petition.

Held, C.R.P. No. 1325 of 1977 must be construed as having been disposed of on the facts before it and it did not cover the other proceeding which was then pending in the lower Court. [*Para.* 3.]

Inability to pay the rent is a very strong circumstance indicating that the default was wilful and that the tenant was not in a position to discharge his obligation to his landlords. Therefore, such a tenant could not claim to be protected under Act XVIII of 1960. [*Para.* 5.]

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*C.R.P. No. 2104 of 1980.
8*th December,* 1981.

Petition under section 25 of Act XVIII of 1960 as amended by Act XXIII of 1973 to revise the order of the Small Cause Court (II Judge), Madras in H.R.A. No. 522 of 1979, H.R.C. No. 183 of 1979, VIII Judge, Small Cause Court, Madras.

K. P. Unnikrishnan and *N. V. Subramaniam*, for Petitioners.

B. Kalathinathan, for Respondent.

The Court made the following

ORDER.—The landladies are the revision petitioners who filed the petition for eviction in respect of a residential building on the ground of wilful default in payment of rent for the period from November, 1975 to September, 1976. The Rent Controller found that the tenant had committed wilful default in payment of rent and ordered eviction. During the pendency of the appeal, the tenant produced a carbon copy of the judgment in *P. S. Elango* v. *Sivagami Ammal and two others*[1], as additional evidence, wherein this Court in a revision petition arising out of an earlier petition for eviction observed that the tenant undertook to pay rent regularly in future and that the tenant should be given a last chance to reform himself and pay the rent regularly without default. Before this order was passed in C.R.P. No. 1325 of 1977, the landlord had already filed another petition for eviction which has given rise to this present civil revision petition for arrears from November, 1975 to September, 1976. When this order in the earlier civil revision petition was produced before the Appellate Authority, it held that the High Court had condoned the delay and the default in payment of rent on the part of the tenant and therefore, there was no wilful default in this case. Consequently, the eviction order was set aside and the appeal was allowed. The landladies are aggrieved by this order and have come on revision.

2. The short point for consideration in this petition is whether the order passed in C.R.P. No. 1325 of 1977 has any relevance to the present petition. It is common ground that the previous C.R.P. No. 1325 of 1977 arose out of the eviction petition which was filed on the ground of wilful default in payment of rent for the period from 1st January, 1973 to 31st May, 1973. The present civil revision petition is with reference to the period of default from November, 1975 to September, 1976 covered by the subsequent petition for eviction. The Appellate Authority has relied on the order passed in the previous C.R.P. No. 1325 of 1977, wherein this Court took an indulgent view and allowed that civil revision petition directing the tenant to pay rent regularly in future. This order is now sought to be used as a defence in the present petition for eviction.

3. Learned counsel for the landladies strenuously contended that the order in C.R.P. No. 1325 of 1977 was only with reference to the subject-matter which arose for consideration in that petition and it cannot have any application for the subsequent period of default. Of course, the order in the said civil revision petition was passed on 16th November, 1978. But, by then H.R.C. No. 183 of 1977 in respect of which this present civil revision petition has arisen had been filed for subsequent arrears. The pendency of the subsequent petition for eviction, namely, H.R.C. No. 183 of 1977 was not brought to the notice of the learned Judge while disposing of C.R.P. No. 1325 of 1977. If it had been brought to the notice by either party, one would expect this Court to have referred to it specifically. Therefore, the subsequent eviction petition H.R.C. No. 183 of 1977 was not before this Court when it disposed of C.R.P. No. 1325 of 1977. Consequently, it follows that C.R.P. No. 1325 of 1977 must be construed as having been disposed of on the facts before it and it does not cover the other proceeding which was then pending in the lower Court.

4. It was also contended on behalf of the landladies that the High Court has no jurisdictions to give directions in respect of the eviction petition which was not before the High Court on the date of the disposal of C.R.P. No. 1325 of 1977. Learned counsel also argued that there is no provision in the Act for condoning the delay in payment of rent by the tenant and that the High Court has no jurisdiction to condone the delay in respect of the period which was not the subject-matter of the previous civil revision petition.

1. C.R.P. No. 1325 of 1977, dated 16th November, 1978.

There is a lot of force in this argument. In fact, in the order in the previous civil revision petition (C.R.P. No. 1325 of 1977), the High Court held that 'the tenant was not fair towards the landlords in the matter of payment of arrears of rent' and further administered a warning to the tenant that "any such repetition of such default can be taken as wilful without any further enquiry apart from the wilfulness which may be proved within the meaning of the *Explanation* to section 10". Consequently, the previous default was 'excused' with a direction. It is not necessary for the purpose of this case to go into the question whether the High Court has or has no jurisdiction to excuse the delay in payment of rent. Of course, it is always open to the Court to find out from the facts of the case whether the alleged default was wilful or not. But, the fact remains that the order rendered in the previous civil revision petition was only with reference to the matter which arose in that case and it cannot apply to the other pending proceedings, especially when there is no reference to it in that order. I am of the view that this petition is with reference to the subsequent default which was not the subject-matter in C.R.P. No. 1325 of 1977.

5. Learned counsel for the landladies submitted that the building is situated in a very busy and important locality, namely, Millers Road, Kilpauk and that the tenant is in occupation on a low rent of Rs. 225, from 1963 onwards without any increase. The conduct of the tenant in refusing to pay even the modest rent for the premises is certainly wilful. Of course, it is stated on behalf the tenant that he has suffered loss in his business and therefore, he is unable to pay the rent for some years. Inability to pay the rent is a very strong circumstance indicating that the default was wilful and that the tenant is not in a position to discharge his obligation to his landlords. Therefore, such a tenant cannot claim to be protected under Act XVIII of 1960.

6. The result is, this civil revision petition is allowed, the order of the Appellate Authority is set aside and that of the Rent Controller ordering eviction is restored. No costs. Time for vacating the premises, three months from today.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Mohamed Ali and another .. *Appellants**

v.

M. K. Abdul Salam Saheb and others .. *Respondents.*

Transfer of Property Act (*IV of* 1882), *sections* 60, 69 *and* 52—*Mortgage—Sale of mortgaged property under section* 69 — *Suit for redemption filed subsequently dismissed — Sale of property mortgaged completed by execution of sale deed — Appeal by plaintiff dismissing redemption suit allowed by lower appellate Court — Second appeal by mortgagee — Mortgage held to have become extinguished with the completion of sale — Suit for redemption cannot be decreed — Doctrine of* lis pendens *inapplicable.*

The suit property was mortgaged to the first defendant with power of sale under section 69 of the Transfer of Property Act. The mortgagee-first defendant brought the property to sale by auction, as the money had become due. The auction sale was held on 13th February, 1969. Thereafter on 17th March, 1969, the plaintiff filed a suit for redemption. The trial Court dismissed the suit and held that the auction sale was valid. On appeal by the plaintiff the lower appellate Court held the auction sale was collusive and not valid and allowed the appeal. The first defendant and the purchaser at the auction filed second appeals.

Held: The conferment of a power of sale without intervention of Court in a mortgage deed by itself will not deprive the mortgagor of his right to redemption. The mortgagor's right to redeem will survive until there has been completion of the sale by the mortgagee by a mortgage deed. Only on such completion by execution and registration, the mortgage could be said to have been extinguished or discharged and so long as the mortgage is not extinguished the right of redemption is always available to the mortgagor.

[*Paras.* 10, 11.]

*S.A. Nos. 1685 and 1703 of 1977 and C.M.P. No. 9877 of 1977.

21*st January,* 1981.

Subsequent to the dismissal of the suit for redemption, on 22nd July, 1975, the sale deed was in fact executed and registered on 11th August, 1975 in pursuance of the auction sale held earlier on 13th February, 1969. Since, at the time when the appellate Court considered the question of the right of redemption of the plaintiff, the sale had been completed and the conveyance had been effected, the mortgage itself had become extinguished and there was nothing for the plaintiff to redeem. [*Para.* 12.]

The doctrine of *lis pendens* could not be applied to the case of a mortgage executed prior to the suit wherein the right of private sale was conferred on the mortgagee. The result therefore, is that though the suit for redemption was maintainable in spite of the right conferred on the mortgagee to bring the property to sale under section 69 of the Transfer of Property Act, the suit itself could not be decreed as the property had subsequently been sold and the sale deed had been executed and registered pending disposal of the suit, extinguishing the mortgage itself. Accordingly, the suit for redemption was liable to be dismissed. [*Para.* 14.]

Cases referred to:—

Narandas v. *S. A. Kamtam,* (1977) 3 S.C.C. 247: (1977) 2 S.C.R. 341: A. I. R. 1977 S.C. 774; *N. Ramakrishna Mudali* v. *Official Assignee,* (1922) 43 M. L. J. 566: I.L.R. 45 Mad. 774: 16 L.W. 133: A.I.R. 1922 Mad. 390 (2).

Appeal against the decree of the City Civil Court (1st Additional Judge), Madras, dated 6th November, 1976 in A.S. No. 281 of 1975, preferred against the decree in O.S. No. 1665 of 1969, III Assistant Judge, City Civil Court, Madras etc.

S. J. Samiullah, for Appellant.

A. S. A. Tajuddin, M. S. Yusuf, K. Kesavanath Davey, S. B. Fazuluddin, Mahaboob Badsha and *Vedantham Srinivasan,* for Respondents.

The Court delivered the following

JUDGMENT.—The first respondent-plaintiff filed O.S. No. 1665 of 1969 on the file of the Third Assistant Judge, City Civil Court, Madras, for redemption of a mortgage, dated 13th February, 1960 executed in favour of the first defendant in respect of the property originally known as door No. 19, Mohammed Hussain Khan Lane, Royapettah, Madras. The mortgaged property originally belonged to defendants 4 to 7 in the suit and they had executed the mortgage, dated 13th February, 1960, for a sum of Rs. 4,000. There was a partition of door No. 19 in the family of the owners and the property was renumbered as door Nos. 19-A, 19-B and 19-C. Door Nos. 19-A and 19-B were allotted to defendants 4 to 6 and door No. 19-C to the seventh defendant, who died pending suit and whose legal representatives are defendants 9 to 13 in the suit. On 2nd July, 1967, defendants 4 to 6 agreed to sell to the plaintiff the equity of redemption in the property, door No. 19-A, measuring 800 sq. ft. for Rs. 9,000 and received an advance of Rs. 250. As per the recitals in this agreement of sale, a sum of Rs. 4,000 out of the sale consideration will have to be in discharge of the mortgage, dated 13th February, 1960. Subsequent to this agreement in favour of the plaintiff the plaintiff also got a mortgage over the same property, namely, door No. 19-A on 19th July, 1967. The amount is supposed to have been borrowed by defendants 4 to 7 under the mortgage for the purpose of discharging an earlier mortgage in favour of the third defendant. When defendants 4 to 6 refused to execute the sale deed in pursuance of the agreement of sale, dated 2nd July, 1967, the plaintiff herein filed O.S. No. 441 of 1967, on the file of the City Civil Court, Madras, praying for a decree for specific performance of the agreement of sale, dated 2nd July, 1967, and for sale of door No. 19-A. When this suit was pending, since the mortgage money due under the mortgage, dated 13th February, 1960 in favour of the first defendant had become due and had not been paid, the mortgagee exercised his power of sale under section 69 of the Transfer of Property Act, under the document and brought the property to sale through the 8th defendant-auctioneers. The property was sold by auction on 13th February, 1969 and the 14th defendant purchased the same. Thereafter this suit was filed on 17th March, 1969 praying for redemption of the mortgage, dated 14th February, 1960. Pending the present suit the suit, O.S. No. 441 of 1967 for specific perfor-

mance was also decreed and on 4th December, 1970 the sale deed was executed in favour of the plaintiff herein in respect of door No. 19-A. The plaintiff in the present suit had pleaded that the sale held on 13th March, 1969, was not valid and that the plaintiff is entitled to redeem the mortgage in favour of the first defendant. The plaintiff also contended that only a sum of Rs. 2,450 was due under the mortgage and that he is entitled to a decree for redemption on payment of that money. The second defendant had been impleaded in the suit, since he was the party who bid at the auction on behalf of the 14th defendant purchaser. The 3rd defendant had been impleaded as a party on the ground that he is the second mortgagee in respect of the original door No. 19, which included the present door Nos. 19-A, 19-B and 19-C and he also happened to be the husband of the auction purchaser. As already stated, defendants 4 to 7 were the original owners of door No. 19 which was later sub-divided into door Nos. 19-A, 19-B and 19-C, among themselves. Pending the suit, the 7th defendant died and his legal representatives are defendants 9 to 13. The 8th defendant is the auctioneering firm and the 14th defendant is the real auction-purchaser.

2. The first defendant contended that the suit for redemption was not maintainable, that he was entitled to bring the property to sale in exercise of his powers under section 69 conferred under the document without recourse to a suit in a civil Court, that the sale held by the 8th defendant was valid and binding on the plaintiff and that the suit was liable to be dismissed. The first defendant also contended that the alleged payment of Rs. 2.000 by the plaintiff to the first defendant towards the mortgage was not true and that it was not correct to state that only Rs. 2,450 was due under the mortgage. The 14th defendant stressed that she was the *bona fide* purchaser for value in the auction held by the auctioneers and the sale cannot be questioned on any ground. The defence of the other defendants were almost the same.

3. The trial Court found that the entire amount of Rs. 4,000 was due towards principal under the mortgage, that interest as and from 1st September, 1967, amounting to Rs. 950 and additional interest of Rs. 90 together with charges payable to the auctioneers were due under the mortgage and that the plaintiff's contention that only a sum of Rs. 2,450 was due under the mortgage, is not correct. The trial Court also found that the conditions for exercise of power under section 69 were present and satisfied, that the auction sale by the auctioneers was legal and valid, that the entire property, namely, door Nos. 19-A, 19-B and 19-C, which were originally comprised in door No. 19 described in the mortgage was sold in the auction and purchased by the 14th defendant and that, since the sale was valid, the suit for redemption is not maintainable. On these findings, the suit was dismissed.

4. The plaintiff preferred an appeal before the First Additional Judge, City Civil Court, Madras. The lower appellate Court held, concurring with the trial Court, that the allegation of the plaintiff that he had paid Rs. 2,000 towards the mortgage to the first defendant was not true. The lower appellate Court further held that the auction sale was collusive and not valid and binding on the plaintiff. The lower appellate Court then proceeded to consider as to whether the plaintiff is entitled to redemption, but, held that he was entitled to redeem door No. 19-A alone and that too on payment of the two-third share of Rs. 4,000 with interest. The reasonings for these findings are as follows: The plaintiff had purchased door No. 19-A alone and he is also put in possession. By permitting the plaintiff to redeem his property alone, the defendants will not be in any way prejudiced. Since the property door No. 19-A was of an extent of 800 sq. ft., which is approximately two-third of the total extent the plaintiff should be permitted to redeem the mortgage over door No. 19-A on payment of the two-third of the mortgage money.

5. Curiously, though the suit was not for redemption of the second mortgage in favour of the 3rd defendant and though the parties did not go to suit in respect of any of the rights under the second mortgage, the lower appellate Court also held that the plaintiff is entitled to redeem the second mortgage in favour of the 3rd defendant also on payment of two-third of the mortgage money due under

the mortgage in favour of the 3rd defendant. A decree for redemption was accordingly given in favour of the plaintiff enabling him to redeem door No. 19-A, Mohamed Hussain Khan Lane, Royapettah, Madras on payment of the two-third share of the mortgage in favour of the first defendant with interest from September, 1967, till payment and two-third share of Rs. 2,000 to the 3rd defendant.

6. The first defendant has preferred S. A. No. 1703 of 1977 questioning the decree for redemption of the mortgage in his favour and the finding of the lower appellate Court that the auction is not valid. The 14th defendant along with her nominee, who bid at the auction, namely, the 2nd defendant, has filed S. A. No. 1685 of 1977 questioning the finding of the lower appellate Court that the auction sale was collusive and not valid and they have contended that subsequent to the dismissal of the suit on 22nd July, 1975, the 14th defendant in fact had got the sale deed executed and registered in her favour on 11th August, 1975. They therefore, contended that the suit for redemption is not maintainable. The plaintiff has not filed any appeal questioning his right nor his liability to redeem the second mortgage in favour of the third defendant.

7. The appellants in S.A. No. 1685 of 1977 have produced the original sale deed executed in favour of the 14th defendant in pursuance of the auction held under section 69, with a petition C.M.P. No. 9877 of 1977, to receive the same as an additional document. Since, the document came into existence subsequent to the dismissal of the original suit, I have ordered that petition to receive the additional document and the same would now become part of the evidence.

8. These two second appeals filed by the first and 14th defendants, therefore, relate and could relate to the rights of the plaintiff to redeem door No. 19-A alone and the discussion hereafter only relates to that door number and the decree dismissing the suit for redemption so far as door Nos. 19-B and 19-C are concerned, has become final.

9. It will be useful now first to discuss as to whether the auction held by the auctioneers was collusive and not valid. There is no dispute that the conditions necessary for invoking the power under section 69 were present and, therefore the sale itself cannot be questioned on the ground that it is violative of section 69. The sale was held by the auctioneers after notice to the plaintiff and defendants 4 to 7. Wide publicity was given and the sale was also advertised in the Hindu. The plaintiff objected to the sale and he did not plead that he had no notice of it. In fact, there was no allegation of any procedural irregularity in the conduct of the sale. The sale has been held to be collusive and not valid and binding on the plaintiff on the ground that the plaintiff had objected to the auction, that the auction-purchaser is the wife of the second mortgagee, that the sale was held "after knowing that the plaintiff had taken sale of the properties of the defendants 4 to 6" and that out of the six persons who bid at the auction and who have attested the auction proceedings, none were examined to show that the second bidder in the auction was no other than the plaintiff's wife. It may be mentioned that the defendants also contended that the plaintiff's wife also took part in the auction but was not a successful bidder. I am wholly at a loss to understand as to how on these grounds the learned appellate Judge could have come to the conclusion that the auction-sale was collusive and not valid. I may also point out that there was no allegation in the plaint that the auctioneers colluded with the mortgagee or anybody against the interest of the plaintiff or that any fraud was committed by the auctioneers. Since there was no allegation against the auctioneers of any fraud or malpractice or collusiveness the auctioneers had also not filed any written statement. There was also no issue relating to the fraud or collusiveness of the auctioneers. The lower appellate Court seems to have imagined such an allegation and posed the same as one of the points for determination in the appeal. Apart from these facts, I am unable to see as to how the fact that the wife of the second mortgagee is the auction-purchaser or the fact that the second bidder was the plaintiff's wife could in any way establish that there was collusion between the auctioneers and the mortgagee-first defendant. Even the judgment does not state what was the collusion or fraud that was committed by the auctioneers in this regard. The statement

that the sale was held 'after knowing that the plaintiff had taken sale of the properties of the defendants 4 to 7' was also factually incorrect. As already stated the suit for specific performance was filed on 7th August, 1968 and it was pending when the sale in exercise of the power under section 69 was held on 13th March, 1969. It was only on 4th December, 1979, long subsequent to the auction-sale, that the sale deed in respect of door No. 19-A was executed in favour of the plaintiff. To say the least, the point posed and the reasonings are all imaginary and the finding is perverse. I accordingly set aside the finding that the auction sale held by the 8th defendant or the purchase by the 14th defendant is not valid. The sale is perfectly valid and binding on the plaintiff.

10. It was next contended by the learned counsel for the plaintiff-respondent relying on a decision reported in *Narandas* v. *S. Kamtam*[1], that the plaintiff is entitled to file a suit for redemption and that the suit could not be dismissed solely on the ground that, pending the suit, the property was sold under section 69 of the Transfer of Property Act. In this case, the Supreme Court held:—

> "The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act, is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of Court in a mortgage deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.
>
> The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England, a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69 (3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is completed by registration the mortgagor does not lose his right of redemption.
>
> It is erroneous to suggest that the mortgagee is acting as the agent of the mortgagor in selling the property. The mortgagor exercises his right under a different claim. The mortgagee's right is different from the mortgagor's. The mortgagee exercises his right under a totally superior claim which is not under the mortgagor, but against him. In other words, the sale is against the mortgagor's wishes. Rights and interests of the mortgagor and the mortgagee in regard to sale are conflicting.
>
> In view of the fact that only on execution of conveyance, ownership passes from one party to another it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction. The mortgagor has a right to redeem unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act."

11. It may be seen from the facts in that case that the mortgagee brought the property to sale on 14th April, 1971 for recovery of a sum of Rs. 1,22,888-22. The highest bid was for Rs. 1,31,001.25 per cent. of the sale consideration was paid on the date of auction and the remaining was paid to the attorneys of the mortgagee and the auction-purchaser took possession of the property on 17th April, 1971. But no sale deed as such had been

1. (1977) 3 S.C.C. 247: (1977) 2 S.C. R. 341; A.I.R. 1977 S.C. 774.

executed. On 13th August, 1971, the mortgagor filed a suit on the file of the Officer on Special duty, under the Co-operative Societies Act, who is the competent authority, for redemption of the mortgage against the auction-purchaser and the mortgagee. The mortgagor obtained an *ex parte* injunction against the execution of the sale deed, which was later, of course, vacated but, in the meantime, the auction-purchaser filed a writ petition in the Bombay High Court under Article 226 of the Constitution and, by an order, dated 16th June, 1971, the Bombay High Court directed that the *status quo* should be continued and that the auction-purchaser shall not be dispossessed pending disposal of the redemption suit. The mortgagor society borrowed a sum of Rs. 1,31,000 and paid the sum to the mortgagee on 15th October, 1972, when the suit for redemption was pending with the officer on special duty. On 16th January, 1975, the Officer on special duty delivered the judgment holding that the dispute was maintainable under section 91 of the Maharashtra Co-operative Societies Act, and that the mortgagor was not entitled to challenge the auction sale held on 14th April, 1971. However, since the conveyance itself had not been executed and registered in pursuance of the auction sale, the mortgagor to sell the mortgaged property perty. It is in these circumstances, the question came up for consideration before the Supreme Court as to whether the mortgagor can exercise his right of redemption after the mortgagee, with power of sale gives notice to the mortgagor to sell the mortgaged property by public auction and sells it by public auction. As may be seen from the facts stated above, the right of redemption could subsist only in a case where the conveyance was not completed by execution of the sale deed and registration of the same in pursuance of the auction. The ratio of the judgment in my opinion, is that only on such completion by execution and registration, the mortgage could be said to have been extinguished or discharged and, so long as the mortgage is not extinguished, the right of redemption is always available to the mortgagor.

12. Subsequent to the dismissal of the suit for redemption, on 22nd July, 1975, the sale deed was in fact executed and registered on 11th August, 1975, in pursuance of the auction sale held on 13th March, 1969. Since, at the time when the appellate Court considered the question of the right of redemption of the plaintiff, the sale had been completed and the conveyance had been effected, the mortgage itself had become extinguished and there was nothing for the plaintiff to redeem. The decision of the Supreme Court referred to above, therefore, should not have been relied on by the plaintiff in support of his plea that he was entitled to redeem in spite of the auction sale.

13. The next question that calls for a decision is as to whether by reason of section 52 of the Act, and the doctrine of *lis pendens* contained therein, the sale deed executed on 11th August, 1975, would be hit by *lis pendens* and therefore is not binding on the plaintiff. The suit shall be deemed to be pending, under the *Explanation* to section 52, from the date of presentation of the plaint till the date of expiration of any period of limitation prescribed for execution of any decree in these proceedings. When the appeal is filed in time against the decree dismissing the suit, there is a continuation of the proceedings and, therefore, certainly, the sale deed executed on 11th August, 1975, shall be deemed to have been done when the suit for redemption was pending.

14. But, it has been held by a Division Bench of this Court in *N. Ramakrishna Mudali* v. *Official Assignee, Madras*[1], that—

> "...... the doctrine embodied in section 52 of the Transfer of Property Act, has no application whatever to a mortgagor who has been given under the mortgage an express power of sale and that he cannot, by starting a suit, perhaps a perfectly hopeless suit for redemption derogate from that which he has on express terms conferred upon the mortgagee by the instrument, namely, the power of sale.
>
> It appears to us that that is the only logical result that can be arrived at and we agree with the view of the Bombay High Court that to hold otherwise would simply be to tear up the instrument which contains the contract agreed upon between the parties"

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1. 43 M.L.J. 566: I.L.R. 45 Mad. 774: 16 L.W. 133: A.I.R. 1922 Mad. 390 (2).

Though the learned Judges have stated that this principle has been held in a series of cases of the Bombay High Court, reference to these judgments has not been given. The ratio of this judgment is clear and it is this. The doctrine of *lis pendens* cannot be applied in a case where the assertions of the right during the pendency of the proceedings is with reference to the right that existed prior to the institution of the suit. In other words, the doctrine applied to proceedings or creation of rights pending the suit and it will not affect a right existing before the suit. In this particular case, the sale was held on 13th March, 1969. It might be argued that the right dates back to 13th March, 1969, prior to the suit but it is not necessary for me to decide it for the purpose of this case, since the right to bring the property by private sale is contained in the document and the right was not created during the pendency of the suit itself. In these circumstances, the doctrine of *lis pendens* could not be applied to the case of a mortgage executed prior to the suit wherein the right of private sale was conferred on the mortgagee. The result, therefore, is that, though the suit for redemption was maintainable in spite of the right conferred on the mortgagee to bring the property to sale under section 69 of the Act, the suit itself cannot be decreed as the property had subsequently been sold and the sale deed had been executed and registered pending disposal of the suit, extinguishing the mortgage itself. Accordingly, the suit for redemption is liable to be dismissed. The second appeals are allowed, the judgment and decree of the lower appellate Court are set aside, in so far as it related to door No. 19-A, Mohammed Hussain Khan lane, Royapettah, Madras and those of the trial Court are restored. There will be no order as to costs.

S.J. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

S. Ramiah Thevar .. *Petitioner**

v.

Balasundaram .. *Respondent.*

Negotiable Instruments Act (XXVI of 1881), *section* 20—*Scope of section — Inchoate stamped instrument—Person completing the instrument not a holder in due course — Maker or the person who signed not liable under the Act.*

Section 20 of the Negotiable Instruments Act, talks of an inchoate stamped instrument which is the very negation of a negotiable instrument, since all that it contains is the signature of the maker on a stamp paper. Section 20 lacks the material words "unconditional undertaking". The mere implied *prima facie* authority conferred by section 20 of the Act, on the person to whom such a paper is delivered to write out the instrument or to complete the instrument is not enough by itself to clothe the instrument with all the characteristics of a full-fledged negotiable instrument. All that section 20 confers on the deliveree of the stamped paper is an implied *prima facie* statutory authority authorising him to complete the instrument or to write up the full text of the instrument delivered to him. The section does not say that by the very act of his filling up the blanks, the person to whom the paper is delivered acquires the right of a promisee under a promissory note. [*Para.* 13.]

A person who makes himself the payee of an inchoate document by writing up or completing the negotiable instrument in a blank paper cannot be regarded as a holder in due course of that document. It follows, therefore, that he cannot render liable the maker or the person who signed that blank document as a person who is liable under the Negotiable Instruments Act, within the meaning of the second part of section 20. [*Para.* 14.]

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*C.R.P. No. 1908 of 1979.

22nd April, 1981.

Case referred to:—

Tarachand v. *Sikri Brothers,* I.L.R. (1953) Bom. 717: 55 Bom.L.R. 231: A.I.R. 1953 Bom. 290.

Petition under section 115 of Act V of 1908 to revise the order of the District Munsif Court, Tirunelveli in O.S. No. 896 of 1978, dated 3rd February, 1979.

V. Sridevan, M. Balachandar, Mrs. Kousalya Balachandar and *P. G. Sethurathanam,* for Petitioner.

Sam V. Chelliah and *T. Rajakumar,* for Respondent.

The Court made the following

ORDER.—This is a revision brought by the plaintiff in a simple money suit of a small cause nature against the respondent. The suit was brought for the recovery of Rs. 550 and interest at 12 per cent. per annum thereon on a promissory note. The defendant resisted the suit. He pleaded that there was no cause of action for the suit. More particularly he pleaded that the suit promissory note could not be sued upon, because he merely signed his name on a stamped paper which was blank, and it had been filled up at the instance of the plaintiff to make it appear that it was for Rs. 550. The truth, according to the defendant was, his signature on a stamped blank paper was taken by the plaintiff in accordance with the plaintiff's practice in such transactions. According to the defendant, he had borrowed a sum of Rs. 220 agreeing to repay it in monthly instalments of Rs. 22 and that by June, 1976, that loan had been discharged by him in that manner. Nevertheless, according to the defendant, the plaintiff had obtained stamp paper with his signature only in accordance with the practice followed by the plaintiff in such transactions. The plaintiff, it was alleged, undertook to return the blank stamped paper when the loan of Rs. 220 was fully discharged by the defendant. In fact, however, even after the loan of Rs. 220 was fully discharged, the plaintiff did not return the stamped paper, but had given a false information to the effect that he had destroyed that piece of paper.

2. At the trial, the suit promissory note was marked in evidence by the plaintiff. He also gave oral evidence as P.W. 1. Another witness called on by him at the trial was P.W. 2, who represented that he was the scribe of the document. Their evidence was that the defendant did not sign any blank paper, but entered his signature only after the text of the promissory note had been written. The defendant in his testimony denied these allegations. He deposed that he only gave the blank stamped paper carrying his signature, on the undertaking that the plaintiff would return it after the earlier loan of Rs. 220 was discharged.

3. The learned District Munsif considered the oral evidence of the witnesses on either side and also examined the promissory note, marked by the plaintiff, as the foundation of the suit claim. The learned District Munsif found that there were scorings and internal contradictions in the so-called promissory note. He also found a discrepancy between the evidence on the plaintiff's side and the pleadings on the basis of which the suit claim was sought to be (*sic*) made. According to the plaint, the defendant executed the promissory note for Rs. 550 on 21st November, 1977, on the defendant receiving the amount on that very day. In contrast, the evidence of the plaintiff as well as the scribe of the text of the promissory note was to the effect that the defendant had received the amount on 19th November, 1977, but, executed the promissory note two days later, namely on 21st November, 1977. The learned District Munsif found, there was a correction regarding the date of the promissory note, which could not be reconciled either with the date of execution of the promissory note or with the dates of payments according to the English calendar, namely, 18th November, 1977 and 21st November, 1977. The learned District Munsif also found that there was a correction in the Tamil Andu set out in the promissory note. The Tamil Andu 1152 was found corrected into 1153 and this introduced another element of incongruity in the document. On this analysis of the evidence, the learned District Munsif recorded a finding that the promissory note was written subsequent to the signature entered by the defendant on the stamps. He further found that the plaintiff

had failed to establish that on 21st November, 1977, the defendant had borrowed the sum of Rs. 550 and executed the suit promissory note. The learned District Munsif was inclined to believe the evidence of the defendant as more probable. On the basis of this evaluation of the evidence, the learned District Munsif dismissed the suit.

4. In this revision, learned counsel, Mr. Balachander appearing for the plaintiff, urged that the dismissal of the suit by the Court below on the ground that there was no cause of action for the suit, was without jurisdiction. Learned counsel submitted that the two material issues which were framed for trial were—(1) Whether the failure of consideration pleaded by the defendant is true? (2) Whether the discharge pleaded by the defendant is true? Mr. Balachander pointed out that there was no distinct issue to the effect that there was no cause of action for the suit. In the grounds of revision, the contention was not stated precisely on these terms. What was urged in the grounds was that the Court below ought not to have expected the plaintiff to prove the case when the issues were framed in the suit, properly imposing the burden on the defendant.

5. I am, however, satisfied that on the finding of the Court below that the suit promissory note was only a blank stamped paper signed by the defendant and that the entire text was subsequently written into it by or at the instance of the plaintiff, the complexion of the suit had completely changed. The Court had then to decide whether on the basis of such an instrument, the plaintiff could obtain a decree against the defendant. In this case, the question of the defendant pleading that he had obtained only a smaller loan and even that loan had been discharged by him receded into the background. It was in this sense that the Court below had felt that the responsibility of the plaintiff is to prove that he had a cause of action which can be enforced against the defendant in this suit on this basis on the so-called promissory note. The fact that no distinct issue was framed in this manner does not, in my opinion, vitiate the determination of the Court below.

6. It is well-settled that where parties adduce evidence on disputed questions of fact or law and argue the matters before the trial Court, and the Court proceeds to decide that point as if there had been an issue framed on the subject, then that decision cannot be set aside in appeal on the ground that no issue was actually framed at the trial. This view of the course of a trial is based on the principle that a mere omission to frame an issue is not fatal to the trial of a suit. The question would be entirely otherwise, if the point decided has not been raised in the written statement. In the present case, however, it has been very clearly raised by the defendant in his written statement that there is no cause of action for the plaintiff on the basis of the so-called promissory note, on which he had founded the suit claim. I must therefore reject the technical plea raised by Mr. Balachander, that the decision of the Court below was not on any distinct issue framed, as such, at the inception of the trial.

7. The defendant's learned counsel then submitted that there was no material for the Court below to hold that the suit promissory note was not executed by the defendant as a promissory note fully written up at the time of its execution. This point goes into the region of fact. I have already summarised the findings of the Court below, as well as the material basis for such findings. I am satisfied that there was ample evidence in support of the learned District Munsif's findings that the defendant merely gave a signed blank stamped paper on which the plaintiff or the scribe had written up the full text of the promissory note. I have, therefore, got to accept that finding, without question in this revision.

8. Mr. Balachander then submitted that even on the basis that the defendant had signed the stamped, but, blank paper which was subsequently filled up in full by the plaintiff, the plaintiff was entitled to file a suit on the promissory note, which he had written into that paper. For this submission, learned counsel relied entirely on section 20 of the Negotiable Instruments Act, 1881. Before considering what section 20 provides for, it may be stated that a 'promissory note' has been defined under that Act, as an instrument in writing containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instru-

ment. This definition clearly shows that what is signed by the maker of a promissory note must be an instrument which itself contains an unconditional undertaking. This at once excludes the signing by the maker of a blank piece of paper, whether stamped or unstamped. It is in the context of this definition of 'promissory note' under the Act, that section 20 of the very same Act assumes significance.

9. Section 20 of the Act deals with what are called in the marginal note as 'inchoate stamped instruments'. According to this provision, where a person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments as such, then the person who signs is thereby giving *prima facie* authority to the holder of that instrument, either to make it as a complete negotiable instrument or to fill up the blanks and make it into a complete negotiable instrument for such amount not exceeding the amount covered by the stamp affixed thereon. This provision is contained in the first part of section 20 of the Act. The section also contains another part to which I shall refer a little later.

10. Mr. Balachander relying on this part of the section, turned to the facts of the present case. He said that even according to the defendant, he signed the suit promissory note containing the revenue stamp of the value of twenty paise. He also referred to the admission of the defendant, both in his written statement and in the course of his testimony at the trial, which was to the effect that after signing his name on the stamp in a blank paper he gave that paper to the plaintiff. According to Mr. Balachander, these facts perfectly fit in with the requirements of section 20 of the Negotiable Instruments Act, and therefore when the plaintiff proceeded to enter the full text of the promissory note in the stamped and signed paper passed on by the defendant, the plaintiff had the fullest statutory authority to do so under section 20 of the Act.

11. It seems to me that in so far as this part of the learned counsel's submission is concerned, I may agree with him that on the facts of the present case, the plaintiff must be held to have acquired *prima facie* authority to enter the full text of the promissory note, the moment the defendant had passed on the signed stamped paper in his favour, but, I cannot accept the further implication in the argument that the Court is bound to accept the textual writings on the promissory note made by the plaintiff as covered by incontestable authority. For, under the express terms of section 20, the delivery of a stamped paper signed by a person only gives *prima facie* authority to the person to whom it is delivered to enter on it words of a kind to make it into a negotiable instrument. (Mark the expression '*prima facie*'). This indicates that the rule laid down by section 20 of the Act is not a rule of law, but merely a rule of evidence. The rule of evidence is that in a case covered by the section, the burden is upon the person who signs the instrument, and who delivers that instrument to another to show that he did not thereby intend to confer any authority on the latter to complete the instrument and make it into a negotiable instrument to be dealt with as such. In the present case, the defendant, both in his pleadings and in his evidence has clearly taken the stand that the delivery of this blank stamped and signed paper by him into the hands of the plaintiff was not to invest the plaintiff with the authority to convert it into a full-fledged promissory note, but, was only intended to be kept by the plaintiff *in terrorem*, to be returned to him when the earlier advance of Rs. 220 had been discharged. This stand taken by the defendant had been accepted by the Court below. If this determination by the Court below can be regarded as one of fact that would have the effect of meeting the arguments of Mr. Balachander based on the first part of section 20 of the Negotiable Instruments Act.

12. Mr. Balachander, further submitted that the Court below did not properly go into this aspect, since the question was not discussed by the Court below on the basis of section 20 of the Act at all. I quite see the learned counsel's point, but at the same time, I do not wish to send the case back for a proper consideration on this aspect of the evidence. For, even on the footing that there was *prima facie* authority for the plaintiff in this case to fill up the blanks or write the whole text of the promissory note in the blank space of the document handed over to the plaintiff. I am of the view that the plaintiff is not entitled to maintain the suit claim on the basis of the promissory note. This conclusion of mine is

based on what is provided for in the second part of section 20 of the Act. This part of the section enacts that where a blank stamped paper had been signed and passed by one person in favour of another and where in exercise of the *prima facie* authority the latter proceeds to enter upon the stamped paper a full-fledged promissory note or other negotiable instrument, then that would have the effect of rendering the person who had signed the instrument as if he had executed a regular promissory note for the amount mentioned in the instrument subsequent to his signature. It is however, to be remembered that the liability of the person signing the blank stamped payer is limited only to a holder in due course. The attempt of Mr. Balachander in the course of his argument was to make out that the plaintiff in this case occupies the position of a 'holder in due course' with reference to this suit promissory note and nonetheless so far the fact that he was the payee under the promissory note. I do not accept this argument as tenable on a correct understanding of the scope of this part of the provisions of section 20 of the Negotiable Instruments Act.

13. It is true that under the Negotiable Instruments Act, the 'holder' of a promissory note is defined as any person entitled in his own name to the possession of the promissory note and to receive or recover the amount due thereon. But, a 'holder in due course' under section 9 of the Act is defined as a person who, for consideration becomes the possessor of a promissory note under section 9; this expression includes the payee of a promissory note only if it is payable to order and the holder, would be a 'holder in due course' only so long as the amount mentioned in the instrument is still payable. The argument of Mr. Balachander was based on these definitions of 'holder' and 'holder in due course' in the Act. I, however, think that the liability of a person signing a blank stamped paper is strictly confined to a holder in due course after the instrument is fully written over. Such a liability does not extend to the person to whom the blank paper is delivered in the first instance. A look at section 20 of the Negotiable Instruments Act would show that the first part of the section employs the expression 'holder' of the instrument to refer to the person to whom the signed blank stamped paper has been delivered. This holder has undoubtedly a *prima facie* statutory authority to fill up the blanks or to write up the entire text of the promissory note, but, the mere act of filling up the blanks or writing up the text of the instrument does not make him a holder in due course within the meaning of the second part of section 20 of the Act. It is this part of the section which precisely lays down and defines the acope of the liability of the signatory of the inchoate instrument under the Act. The implication of the section is that a mere blank stamped paper containing the signature of an individual cannot be a promissory note or other negotiable instrument. Any Tom, Dick or Harry, who gets hold of a blank stamped instrument cannot fill it and set himself up as a 'holder in due course' claiming rights against the maker of the instrument. Even the person to whom the stamped, signed paper is delivered is not, in the eye of law, entitled to enforce it as against the maker. To invest the deliveree of an unstamped signed instrument with the trappings of a holder in due course would be, to go against the grain of the Negotiable Instruments Act, as a whole and particularly of the definition of 'Negotiable Instrument' and also of the subsidiary definitions of the expressions, "promissory note, bill of exchange, and cheque". The statutory definition of 'promissory note' insists that the instrument must be in writing and it must contain an unconditional undertaking in writing and that unconditional undertaking must be signed by the maker of the instrument. Otherwise, the instrument cannot be called a promissory note. Section 20 of the Act talks of an inchoate stamped instrument which is the very negation of a negotiable instrument, since all that it contains is the signature of the maker on a stamp. Section 21 lacks the material words 'unconditional undertaking'. The mere implied *prima facie* authority conferred by section 20 of the Act, on the person to whom such a paper is delivered to write out the instrument or to complete the instrument is not enough by itself to clothe the instrument with all the characteristics of a fullfledged negotiable instrument. All that section 20 confers on the deliveree of the stamped paper is an implied *prima facie* statutory authority authorising him to complete the instrument or to write up the full text of the instrument delivered to him.

The section does not say that by the very act of his filling up the blanks; the person to whom the paper is delivered, acquires the right of a promisee under a promissory note. Even the second part of section 20, which deals with the consequence of filling up the instruments, does not, in so many words, confer on the holder in due course any right of recourse against the maker of the instrument. All it does is to lay down that a 'holder in due course' who has got such an instrument is liable under that instrument in the same way as a regular 'holder in due course' of an instrument which has never been an inchoate instrument, but has been from the very start a fullfledged negotiable instrument. To spell out from section 20 of the Act, that the person to whom an inchoate instrument has been delivered and who has filled it up by himself would be entitled to all the rights of a promisee under a promissory note, is to read words in the section which are simply not there.

14. This position which I have derived from the words of the section, is supported by an authority of a Division Bench of the Bombay High Court reported in *Tarachand* v. *Sikri Brothers*[1]. That was a case where the plaintiff gave a loan of Rs. 5,000 to one Hariram, who, in turn, gave the plaintiff an inchoate hundi drawn by the defendants for that amount. The plaintiff discounted the hundi with the Central Bank. The Central Bank presented the hundi to the defendants for acceptance, but, the hundi was dishonoured. Thereupon the Central Bank recovered the sum of Rs. 5,000 from the plaintiff, because it was the plaintiff who had discounted the hundi with the bank. The plaintiff paid the amount to the bank and thereafter filed a suit against the defendants to recover Rs. 5,000. The defendant's case was that they did not receive any consideration from the plaintiff and they themselves had been defrauded by Hariram, against whom they had proceeded criminally and Hariram was subsequently convicted. The question before the Bombay High Court was whether the plaintiff had any right under section 20 of the Negotiable Instruments Act under which he could seek to recover the amount from the defendants who were the makers of the inchoate instrument. The Division Bench answered the question in the negative and against the plaintiff in that case. On the facas, it was found that the defendants had received no consideration whatever for the execution of the inchoate hundi and there was failure of consideration, but the principal basis for the execution of the inchoate hundi there was failure of consideration, but the principal basis for the decision of the Division Bench was that the plaintiff could not maintain the action by virtue of anything contained in section 20 of the Negotiable Instruments Act. Chagla, CJ., speaking for the Bench summarised the effect of the provisions of section 20 in the following manner; The section, he pointed out, provides for two rights in respect of two different persons. One is the right given to the holder of the document, the person who is in possession of the document, the document being an inchoate document and that right is the right to complete it. The other right conferred is upon the holder in due course and that right is that even though the holder in due course might come into possession of a negotiable instrument which was not wholly completed by the maker, he has the same right against the maker as if the maker had himself written out the whole of the document, if the document has been completed by the person who has come into possession of it as contemplated by section 20. Addressing himself to the question whether the person who himself filled in the document by making himself the payee, can be regarded as a holder in due course so as to exercise the rights under that instrument and render the maker of the instrument liable thereunder. Chagla, CJ., answered this position in the following passage:—

> "The interesting question that arises is whether the fact that he himself...... Assuming for the sake of this argument that the plaintiff had given consideration for the document."

The learned Judge answered this question with reference to the definition of the expression 'holder in due course' under section 9. According to the learned Judge it is only where a person comes into possession of a negotiable instrument having paid consideration for it and being a *bona fide* transferee, he can be regarded as a holder in due

1. I.L.R. (1953) Bom. 717: 55 Bom. L.R. 231: A.I.R. 1953 Bom. 290.

course within the meaning of section 9. The section implies and contemplates that there must be a negotiation or a transfer to the holder in due course by someone who had the authority to transfer or negotiate the negotiable instrument. The transfer and the negotiation must be of a negotiable instrument and not the transfer of an inchoate document which is not a negotiable instrument at all under the Act. On the basis of this reasoning, Chagla, CJ., concluded that a person who under the first part of section 20 had the *prima facie* statutory authority to fill in an inchoate instrument and make it into a negotiable instrument, cannot be said to have become the holder in due course, since, he does not become holder by virtue of negotiation or transfer of a negotiable instrument. What he did was to convert an inchoate document into a completed instrument, and this process, which is authorised by section 20 does not amount to negotiation or transfer of full-pledged negotiable instrument. Hence, a person who makes himself the payee of an in choate document by writing up or completing the negotiable instrument in a blank paper cannot be regarded as a holder in due course of that document. It follows, therefore that he cannot render liable the maker or the person who signed that blank document as a person who is liable under the Negotiable Instruments Act within the meaning of the second part of section 20.

15. I consider the decision of the Bombay High Court above cited, as an authority for the position that a person, who might have lawfully exercised the right under section 20 of the Negotiable Instruments Act, to convert a mere inchoate instrument into a fullfledged instrument making himself a payee thereunder, cannot by the mere act of conversion of the inchoate instrument into a pucca instrument, render the person who signed the inchoate instrument, as the maker of the negotiable instrument. I, therefore, reject the contention of Mr. Balachander based on section 20 of the Negotiable Instruments Act.

16. In the events, the dismissal by the District Munsif of the plaintiff's suit was quite justified, although, for reasons which the learned District Munsif had not had the opportunity of considering at the trial. In the result, this civil revision petition is dismissed, and the decree of the learned District Munsif is affirmed. Having regard to the basis on which I have rendered the decision in this civil revision petition, there will be no order as to costs.

S.J. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. N. Singaravelu, J.*

M|s. Gillanders Arbuthnot & Co., Ltd. ..*Petitioner**

v.

Mrs. V. R. Badhrunnissa .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 10 (3) (a) (iii), 10 (3) (d)—*Petition for eviction—Premises required for landlady's husband doing business at Singapore to open an office at Madras—Landlady's requirement held not* bona fide *by Rent Controller — Appellate Authority reversing order of Rent Controller holding that landlady's requirement was* bona fide—*Claim by tenant for protection under section* 10 (3) (d) *under a lease deed renewed by the vendor of the landlady — Appellate Authority holding that the lease deed was executed without proper authority—On revision by tenant landlady's requirement held not* bona fide.

The landlady purchased the building on 6th April, 1979. The building had a ground floor, first floor and second floor. The landlady filed an eviction petition against all the tenants. Subsequently she entered into some arrangement with the tenants occupying the first floor and second floor and withdrew the eviction petition against them. The ground floor was occupied by a company which had a renewed lease deed dated 6th April, 1979, for a period of five years from the vendor of the landlady. The landlady pressed her petition against the tenant occupying the ground floor

*C.R.P. No. 674 of 1981.
22nd December, 1981.

on the ground that the same was required for her husband doing business at Singapore to open an office at Madras. The tenant resisted the petition and contended that the requirement of the landlady was not true and *bona fide*. The tenant also claimed protection under section 10 (3) (*d*) of the Tamil Nadu Act XVIII of 1960. The Rent Controller dismissed the petition as not *bona fide*. However on appeal by the landlady, the Appellate Authority ordered eviction. The tenant filed a revision,

Held: Firstly, there was nothing to show that the landlady's husband was actually carrying on any business at Madras. Secondly, the premises that fell vacant had not been occupied by the husband. Thirdly, there was no evidence at all to show that the landlady's husband had made any preparations for starting the business. These vital points had been ignored by the Appellate Authority which had come to an erroneous conclusion that the requirement must be *bona fide*. [*Para*. 3.]

The Appellate Authority committed an error and probed into the question whether the renewed lease deed was true or not and came to the conclusion that the lease deed was executed by the vendor, namely, the previous owner of the building without proper authority. For one thing, the validity of the lease deed need not be proved in detail in a proceeding under the Rent Control Act and it was enough if the tenant *prima facie* proved that he was entitled to be protected under section 10 (3) (*d*) by virtue of a solemnly registered document. For another, the rent deed also stood scrutiny, and it could not be rejected in the manner in which the Appellate Authority had done it. [*Para*. 4.]

Petition under section 18 of Tamil Nadu Act (XVIII of 1960) (as amended by Act XXIII of 1973), to revise the order of the Small Cause Court, VI Judge, Madras, dated 19th December, 1980 in H.R.A. No. 397 of 1980—H.R.C. No. 1829 of 1979, Small Causes Court VI, Judge, Madras.

S. Sampathkumar, *P. A. S. Kasthurirangan* and *S. Ramanarayanan*, for Petitioner.

P. K. Jamal Mohd. and *J. Rajakalifullah*, for Respondent.

The Court delivered the following

JUDGMENT.—The tenant is the revision petitioner. The respondent landlady filed the petition for eviction in respect of a non-residential building under section 10 (3) (*a*) (*iii*) on the ground of requirement for the occupation of her husband. The tenant contended that the requirement is not *bona fide*, and that in any event, the landlady is not entitled to file a petition before the expiry of the lease period agreed to between the parties. The Rent Controller accepted the case of the tenant and dismissed the petition. On appeal, the Appellate Authority reversed the finding of the Rent Controller and ordered eviction. Hence the revision by the tenant.

2. The premises in question is a multistoreyed building consisting of ground floor, first floor and second floor at North Beach Road near the Madras Harbour. The tenant is M|s. Gillanders Arbuthnot and Co., Ltd. The building in question originally belonged to South India Flour Mills Ltd., Madras through whom the tenant was inducted into possession. The landlady, namely, the revision petitioner herein, purchased the building on 6th April, 1979, and thereafter called upon the tenant to vacate the premises on the ground of requirement for the purpose of business of her husband who is a businessman and an exporter at Singapore. These facts are not disputed.

3. The first point to be considered is, whether the requirement of the premises by the landlady for the purpose of running the business by her husband is *bona fide*. It is common ground that the landlady's husband is a citizen of Singapore doing export and import business at Singapore. According to the landlady the demised building at Madras is required for the purpose of using it as a godown as well as office for the business run and carried on by her husband at Singapore. The landlady's husband has given evidence as P.W. 1 and has stated that he wants to open up an office at Madras in the leasehold premises so that it will be convenient for him for the purpose of his business. It was elicited from him that though he and his father have been doing export and import business at Singapore from 1963, onwards, they have not chosen to set up any office at Madras till

now. In short, there is no evidence to show that the landlady's husband is carrying on any business at Madras on the date of the petition. There is also no evidence to show that they have made any preparations for setting up an office or godown at Madras. That apart, it was elicited from P.W. 1 that the landlady filed eviction petitions against the tenants in the first and second floors, but unceremoneously withdrew the same after some arrangement with them. The tenant herein is in occupation of the ground floor. It was found by the Rent Controller that the conduct of the landlady in withdrawing the eviction proceedings against the tenants of the first and second floors indicates that the requirement is not *bona fide.* Further, since the tenants in the first and second floors have agreed to vacate, P.W. 1 can easily be accommodated in those premises. Placing reliance on these facts, the Rent Controller rejected the case of the landlady and held that the requirement is neither true nor *bona fide.* It was also pointed out that in the notice, Exhibit R-4, the landlady asked the tenant to vacate stating that the ground floor will easily fetch a monthly rent of Rs. 5,000 at the current market rate, and that if the tenant does not vacate, she will take action and recover damages at the rate of Rs. 5,000 per month. This is yet another circumstance to show that the eviction petition is motivated and that her only object is to get a fat rent from the tenant. On this evidence, the finding of the Rent Controller is justified. However, the Appellate Authority has held that there is nothing artificial in a Singapore merchant engaged in export and import business having an office at Madras near the Harbour. In this view, the Appellate Authority found that the requirement was *bona fide.* But, the finding of the Appellate Authority is contrary to the evidence on record and also to the legal requirement under section 10 (3) (*a*) (*iii*). Firstly, there is nothing to show that P.W. 1 is actually carrying on any business at Madras. Secondly, the premises that fell vacant have not been occupied by P.W. 1. Thirdly, there is no evidence at all to show that P.W. 1 has made any preparations for starting the business. These vital points have been ignored by the Appellate Authority which has come to an erroneous conclusion that the requirement must be *bona fide.* I am unable to sustain the finding of the Appellate Authority that the requirement is *bona fide.*

4. There is another formidable impediment to the landlady seeking eviction of the tenant. Exhibit B-8 is a lease deed, dated 6th April, 1979, executed by the vendor of the landlady under which the lease deed was renewed on an enhanced rent of Rs. 1,400 per month for a period of five years with an option to renew for a further term of five years from 1st January, 1974. Originally, the rent was Rs. 1,100 and under this lease deed, Exhibit B-8, the vendor of the landlady had bargained for an enhanced rent and executed a rent deed in favour of the tenant. The learned counsel for the tenant relies upon this registered rent deed, Exhibit B-8 and claims protection under section 10 (3) (*d*). The Rent Controller accepted this argument of the tenant. But, the Appellate Authority again committed an error and probed into the question whether the renewed lease deed was true or not, and came to the conclusion that the lease deed was executed by the vendor, namely, the previous owner of the building, without proper authority. For one thing, the validity of the lease deed need not be proved in detail in a proceeding under the Rent Control Act, and it is enough if the tenant *prima facie* proves that he is entitled to be protected under section 10 (3) (*d*) by virtue of a solemnly registered document. For another, the rent deed under Exhibit B-8 also stands scrutiny, and it cannot be rejected in the manner in which the Appellate Authority has done it. It may be recalled that the previous owner is a Private Limited Company, namely, the South India Flour Mills (Private) Ltd., Madras, having Board of Directors bound by the Company Law. In other words, it is not a private individual who has entered into a transaction surreptitiously with profit motive. This lease deed was executed by one of the Board of Directors of the Limited Company, one, Rajendra Shah, who had executed the sale deed in favour of the present landlady. Exhibit P-1 is a copy of the resolution of the South India Flour Mills (Private) Ltd., dated 30th March, 1979, under which the Director Rajendra Shah was authorised to execute necessary documents for the sale. Therefore, it is far-fetched to contend that the Director who had authority to execute a sale deed in

favour of the landlady had no authority to execute a lease deed to the tenant, Messrs. Gillanders Arbuthnot and Co., Ltd.

5. Learned counsel for the landlady strenuously contended that this lease deed is suspicious in that both the lease deed and the sale deed were executed on the same day and therefore, this renewal of the lease deed had been brought about behind the back of the landlady. There is absolutely no basis for this contention, since the sale deed, Exhibit R-3 itself clearly recites that the lessee, Messrs Gillanders Arbuthnot and Co., is in possession of the premises as a tenant and that the tenant will attorn to the vendee. Again, it is not as if the lease deed under Exhibit B-8 came into existence all of a sudden. There is also documentary evidence in the shape of Exhibits R-1 to R-7, which is the correspondence between the owner and the lesseee for the renewal of the lease. They clearly show that the negotiations for the renewal of the lease started even in September, 1978, whereas the sale deed in favour of the landlady was only on 6th April, 1979. Then, after prolonged negotiations for over six months the previous owner, namely, a responsible company had renewed the lease deed on the same day simultaneously with the sale deed. What is more, it is clearly recited in the sale deed itself that Messrs. Gillanders Arbuthnot and Co., namely, the tenant herein, has a right of renewal of the lease and that the tenant has also prepared a fresh lease deed in respect of the ground floor for a period of five years and that it is under execution. After this clear recital to which the landlady was a party it is frivolous to contend that she was not aware of the fresh lease deed or agreement of renewal or that it is not binding on her. On the other hand, the landlady with eyes wide open has purchased the property perhaps under the impression that she will be able to evict the tenant on some ground or other. The Appellate Authority has completely ignored the recital in the sale deed just now referred to and committed a grave error in finding that the lease deed Exhibit B-8 is suspicious. Of course, the lease deed was executed at 3 P.M. and the sale deed was registered between 5 and 6 P.M. on the same day. But, there is nothing suspicious or fraudulent about it especially when the purchaser had been put on notice about the renewal of the lease. The result is, the tenant is protected under section 10 (3) (*d*) and the landlady who is a subsequent purchaser cannot go behind it and ask for eviction. Therefore, the finding of the Appellate Authority is clearly erroneous both on the ground of law and on the question of fact, and therefore, it cannot be allowed to stand. Consequently, the revision petition is allowed with costs and the eviction petition stands dismissed.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam and V. Sethuraman, JJ.*

M|s. Southern Motors, Madurai .. *Appellant**

v.

C. Sivajothiammal and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 95 (2) (b) — *Motor accident — Bus passenger getting down at a bus stop to give way to those getting down from the bus—Bus beginning to move before passenger could get in—Passenger falling down in attempting to get into the bus and sustaining leg injuries to which he succumbed later—Claim petition by dependants before the Motor Accidents Claims Tribunal—Conductor and driver of the bus found guilty of negligence—Appeal by bus owner to High Court—Negligence of driver and conductor affirmed — Deceased held also not to be a passenger at the time of accident—Insurer held liable to pay the entire compensation of Rs.* 23,000.

The deceased was travelling in a bus from Usilampatti to Palani. At the Kaliamman bus stop in Bathalagundu he got down from the bus to make way for some of the passengers getting down. Thereafter, before the deceased could get into the bus, the bus

*A.A.O. No. 433 of 1979. *17th June,* 1981.

moved. The deceased attempted to board the running bus and fell down and sustained leg injuries and succumbed to the injuries later. The wife, children and mother filed a claim petition before the Motor Accidents Claims Tribunal which held that the conductor and driver were rash and negligent and awarded a compensation of Rs. 23,000. The Tribunal held the insurer was liable to pay only Rs. 5,000 under section 95 (2) (b) of the Motor Vehicles Act. The bus owner filed an appeal to the High Court.

Held, the driver and the conductor of the bus were negligent in driving the vehicle in that the bus moved from the bus stop before all those persons who got down from the bus at the bus stop got into the bus. [*Para.* 6.]

A person who did not get into the bus and failed in his attempt to get into the bus could not be said to be in any sense a passenger in the bus at the second stage of the journey between Bathalagundu and Palani. The deceased was not a passenger at the time of the accident and, therefore, the liability of the insurer could not be restricted to Rs. 5,000 as contemplated by section 95 (2) (b) of the Motor Vehicles Act. The insurer was liable to pay the entire compensation. [*Para.* 8.]

Appeal against the order of the Motor Accidents Claims Tribunal (IV Additional Sub-Judge), Madurai, dated 25th November, 1979 in M.A.C.O.P. No. 84 of 1976.

R. Sengottian, S. Mohanaraju and *S. Nandakumar,* for Appellant.

Raj and *Raj, S. Sampath Kumar* and *A. P. S. Kasturirangan,* for Respondents.

The Judgment of the Court was delivered by

Ramanujam. J.—This appeal arises out of an award passed by the Motor Accidents Claims Tribunal in M.A.C.O.P. No. 84 of 1976, granting a sum of Rs. 23,000 as compensation to the claimant in the said O.P. in respect of a fatal accident that took place at Bathalagundu at about 8-30 A.M. on 10th April, 1976, in which one Guruswami died.

2. On 10th April, 1976 at about 8-30 A.M. a bus belonging to Messrs, Southern Motors, the appellant herein, was leaving Kaliamman Koil bus stop on its way to Palani. At that point of time, the deceased Guruswami in his attempt to get into the bus is said to have fallen down from the moving bus. As a result of the fall from the moving bus he sustained leg injuries to which he succumbed later. On the basis that the said accident was due to the rash and negligent conduct of the conductor and the driver of the bus, the wife, the three children of the deceased and his mother filed a claim petition under section 110-A of the Motor Vehicles Act, claiming a total compensation of Rs. 25,000.

3. In the said claim petition, M/s. Southern Motors, alleged to be the owner of the bus and the insurance company with which the bus has been insured, the conductor of the bus and the driver of the bus have respectively been cited as respondents 1 to 4, Respondents 3 and 4, the driver and the conductor of the bus which was involved in the accident remained *ex parte* and the claim petition was contested mainly by the owner of the bus and the insurance company. Their main defence was that the deceased Guruswami did not travel at all in the bus in question, that, in any event, as the deceased had attempted to get into the bus after the bus had made a move from the bus stop, he should be taken to be exclusively responsible for the accident in question, and that there was no question of any rash and negligent driving of the bus by the driver nor was the conductor rash and negligent in giving the whistle for the bus to move. They also contended that in any event, the compensation claimed was excessive. The insurer, the second respondent before the Tribunal in the claim petition, also took up a further plea that, in any event, its liability should be restricted to Rs. 5,000, as the deceased was a passenger in the bus.

4. On these rival contentions, the following two points were taken up for consideration by the Tribunal—

1. Whether the death of the deceased Guruswami took place on account of the rash and negligent conduct of the driver and the conductor of the bus? and

2. If so, whether the petitioners are entitled to compensation and to what extent?

After analysing the evidence in detail, the Tribunal, on the first question held that the rashness and negligence on the part of the driver and the conductor of the bus had been established and therefore, the owner and the insurer of the vehicle cannot escape their liability for the accident in question. On the question of quantum of compensation the Tribunal held that a sum of Rs. 23,000 is payable as compensation, out of which the liability of the insurer is to be restricted to Rs. 5,000 in accordance with the provisions of section 95 (2) (*b*) of the Motor Vehicles Act.

5. Aggrieved against the award of the Tribunal, Messrs. Southern Motors, the owner of the bus, which was involved in the accident has filed this appeal challenging the finding of the Tribunal that the driver and the conductor of the bus were rash and negligent and it is that rashness and negligence which was responsible for the accident.

6. According to the learned counsel for the appellant, the Tribunal is in error in holding that the conductor of the bus prevented the deceased, Guruswami, from entering into the bus and pushed him down as alleged by the claimants, overlooking the fact that in the first information report given by the elder brother of the deceased, who was examined as P.W. 2, no reference has been made to the conduct of the conductor pushing down the deceased Guruswami while he was entering into the bus at the bus stop. It is seen that the Tribunal accepting the evidence given by P.W. 2, to the effect that the conductor not only gave a whistle for the starting of the bus from the bus stop, before Guruswami got into the bus, but also pushed him down when he was actually getting into the bus, gave a finding that the driver of the bus was negligent in starting the bus before all the passengers got into the bus, and the conductor in pushing down the deceased Guruswami, who was getting into the bus and that this showed that both the driver and the conductor of the bus had been negligent in driving the vehicle. The learned counsel for the appellant attacks the said finding of the Tribunal on the ground that the evidence of P.W. 2, at the enquiry is a development on the case which has originally been put forward in the first information report which he gave to the police immediately after the accident, that in the first information report he has merely stated that the deceased fell down from a moving bus and sustained injuries and that the first information report does not say that the driver and the conductor of the bus were in any way rash and negligent and, that therefore, the first information report being the earliest record relating to the cause and the nature of the accident should have been given more weight than the case as deposed by P.W. 2, at a later point of time at the stage of the enquiry. We have compared the statements made in the first information report. Exhibit P-2, given by P.W. 2, before the Tribunal at the stage of the enquiry. We see there is a considerable variation in the case as put forward in the first information report and in the deposition given by P.W. 2, before the Tribunal. In the first information report no allegation has been made either against the driver of the bus or the conductor of the bus. It is only in the deposition at the stage of the enquiry on a claim petition filed by the claimants. P.W. 2, has deposed that even when the deceased was entering into the bus, the driver started the bus and the conductor prevented his entry into the bus and pushed him down as a result of which the deceased fell down and sustained injuries. There cannot be any dispute that Exhibit P-2, the first information report, came into existence immediately after the accident, while the deposition was given presumably after a considerable deliberation at the stage of the enquiry on the claim petition. The theory of conductor pushing down the deceased and barring his entry into the bus has been introduced for the first time in the claim petition and later at the stage of the evidence. However, it is seen that in the criminal proceedings initiated against the driver of the bus in C.C. No. 313 of 1976, on the file of the Sub-Divisional Judicial Magistrate, Dindigul, whose judgment has been marked as Exhibit P-2, the following observation is made by the Criminal Court—

> "The fact that the deceased sustained injuries due to the fall from the bus and succumbed to the injuries sustained by him is not disputed......".

Thus, the Criminal Court did not accept the theory that the conductor pushed down the deceased. The only case accepted by the Crimi-

nal Court was that the conductor prevented the deceased Guruswami from entering into the bus. Though it was alleged that the conductor of the bus pushed down the deceased from the bus, that was not accepted by the Criminal Court. In these circumstances, we are of the view that the Tribunal is in error in holding without any material to support the same that the conductor of the bus pushed down the deceased from the bus at the time when he attempted to enter into the bus. Though we are of the view that the conductor would not have pushed down a passenger, who has already got into the bus or attempted to get into the bus, as alleged by P.W. 2, still we are not in a position to say that the conductor and the driver of the bus were not negligent. Having stopped the bus at a bus stop and called upon some of the passengers including the deceased to get down from the bus so as to give way to the passengers, who were getting down at the bus stop, he should have waited till all the persons who got down got into the bus before the bus actually moved away from the bus stop. As already stated, it is not in dispute that the deceased fell down from a moving bus while he was in the process of attempting to get into the bus. Even if the conductor has not pushed down the deceased when he attemped to get into the bus, the fact that the bus was not stopped for allowing the passengers to get into the bus would show that the driver and the conductor of the bus are guilty of negligence to that extent. Though we differ from the finding of the Tribunal that the conductor actually pushed down the deceased from the bus while he attempted to get into it, we hold that the driver and the conductor of the bus were none the less negligent in driving the vehicle, in that the bus was moved from the bus stop before all those persons who got down from the bus at the bus stop got into the bus. We therefore, agree with the ultimate finding of the Tribunal that the driver and the conductor of the bus were negligent in their conduct in running the bus.

7. Coming to the quantum of compensation it is seen that the Tribunal has given a sum of Rs. 5,000 for pain and suffering and Rs. 3,000 to the widow for loss of consortium and Rs. 15,000 for loss of pecuniary benefit and also loss of expectation of life. Though the learned counsel for the appellant contends that the compensation awarded is excessive, on the materials on record, we are not in a position to say that the sum of Rs. 23,000, awarded as compensation is in any way excessive. We are not, therefore, inclined to interfere with the quantum of the compensation fixed by the Tribunal.

8. However, there remains another question as to the apportionment of liability. The Tribunal has held that the insurer of the bus is liable only to the extent of Rs. 5,000, as the deceased was a passenger in the bus and the balance of compensation has to be paid by the owner of the bus to the claimants. The learned counsel for the appellant vehemently contends that the Tribunal is in error in restricting the liability of the insurer to the sum of Rs. 5,000 on the ground that the deceased was a passenger in the bus while in fact the deceased cannot be taken to be a passenger in the bus as he fell down from the bus while he attempted to get into the bus and that a person who attempts to get into the bus and fails to get an entry into the bus and falls down cannot be said to be a passenger at all. As against this submission, the learned counsel for the insurer contends that admittedly the deceased had travelled in the same bus as a passenger between Usilambatti and Bathalagundu and the fact that the deceased got down from the bus at the bus stop will not make him any the less a passenger of the bus. It is true that the deceased Guruswami travelled in the bus from Usilampatti along with others like P.W. 2 to P.W. 4. But it is not in dispute that at the Kaliamman Koil bus stop at Bathalagundu the deceased got down from the bus so as to give way to persons getting down from the bus at the bus stop. The evidence in the case is clear that thereafter the bus began to move before the deceased got into the bus and after seeing the bus moving, the deceased ran after the bus and attempted to get into the moving bus. It is at this stage he fell down from the bus and sustained the injuries. These facts are spoken to by P.W. 3, the son of the deceased, who was already inside the bus. P.W. 3 has specifically stated that before his father could get into the bus, the bus moved and his father (the deceased) was following the bus trying to get into the bus when it was on the move. The sketch of the scene of the occur-

rence, which forms part of the judgment of the Criminal Court and which has been marked before the Criminal Court as Exhibit P-5, indicates that the deceased fell down from the bus at some distance from the bus stop, which indicates that the deceased should have followed the moving bus and attempted to get into the bus, but fell from the bus and his legs were run over by the left rear wheel of the bus. In those circumstances the question is whether the deceased could be said to be a passenger in the bus at the time of the accident. No doubt, he was a passenger in the bus when the bus was between Usilampatti and Bathalagundu. But, at the second stage when the bus left Bathalagundu for Palani, the deceased was not a passenger and he is only a person who attempted to get into the bus, but failed to get into the bus. Though the learned counsel for the insurer contends that all persons who are authorised to travel in the bus by the issue of tickets should be taken to be passengers of the bus, we are not in a position to accept such a wide proposition. As a matter of fact in a judgment of this Court, Natarajan, J., in the *Madras Motor and General Insurance Co., Ltd., Tirunelveli* 3 v. *Perumal Konar and others*[1], held that a person travelling in the foot-board without actually entering into the bus cannot be taken to be a passenger and that if death or injury is caused to such a passenger, there cannot be any limit on the insurer's liability. However, it is unnecessary for us to go to the extent of saying that a person travelling in the foot-board is not a passenger, as in this case we are not concerned with a person travelling in the foot-board, but with a person who did not actually get into the bus and fell down and sustained injuries by a fall from the moving bus, in his attempt to get an entry into the bus while it was moving. As already stated, the fact that the deceased was a passenger at an earlier stage when the bus travelled from Usilampatti to Bathalagundu is not quite determinate. Admittedly, the deceased got down in the bus stop and he had not secured entry into the bus for a further journey from Bathalagundu to Palani. A person who did not get entry into the bus and failed in his attempt to get into the bus cannot be said to be in any sense a passenger in the bus at the second stage of the journey between Bathalagundu and Palani. We are, therefore, of the view that the deceased was not a passenger at the time of the accident and therefore, the liability of the insurer cannot be restricted to Rs. 5,000 as contemplated by section 95 (2) (*b*) of the Act. The Tribunal is in error in restricting the liability of the insurer to Rs. 5,000 treating the deceased as the passenger. We have, therefore, to set aside that finding of the tribunal and hold that the insurer is liable to pay the entire compensation.

9. It is said that the insurer has already paid a sum of Rs. 5,000. Therefore, the insurer is directed to pay the further sum of Rs. 18,000, to the claimants, subject to the liability of interest as provided by the tribunal. It is represented that on the interim direction given by this Court, the appellant had deposited some amounts towards the award before the tribunal. Now that the insurer has been made liable for the entire amount of compensation, the amount deposited by the appellant should be returned. If the amount deposited by the appellant has not been withdrawn by the claimants the same will be paid out to the appellant. If the claimants have already withdrawn the amount deposited by the appellant, then the appellant can withdraw the same as and when the insurer deposits the amounts as per the award passed by this Court.

10. The appeal is therefore allowed to the extent indicated above. However, there will be no order as to costs.

S.J. —— *Appeal partly allowed.*

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1. C.M.A. Nos. 7 and 25 of 1972.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

V. A. Narayana Raja .. *Appellant**

v.

Ranganayaki Achi (died) and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Mortgage decree — Execution petition posted to 30th November, 1967—Adjourned on that date to 22nd December, 1967 —Eviction petition advanced by Court suo motu *and taken on 1st December, 1967 and ordered to be posted on 2nd December, 1967 — Defendant not present on 2nd December, 1967—Adjourned to 4th December, 1967, with direction to inform defendant's counsel —On 4th December, defendant not present—Proclamation and sale ordered on 22nd January, 1968—Proclamation and sale conducted in absence of the defendant — Application by defendant to set aside sale dismissed by executing Court—Appeal to High Court—Settlement of proclamation and conduct of sale held irregular—Sale set aside.*

The decree-holder under a mortgage decree filed an execution petition to bring to sale the hypotheca for realising the decree amount. On the decree-holder's death his legal representatives were brought on record on 30th November, 1967. On that day, the execution petition was posted to 22nd December, 1967. However, it appeared that the execution petition was advanced and taken on 1st December, 1967 and notice was directed to be issued for 2nd December. 1967. On 2nd December, 1967, neither the defendant nor his counsel was present in Court and the execution petition was adjourned to 4th December, 1967. On 4th December, 1967, the defendant was absent. Proclamation and sale were fixed on 22nd January, 1968. The sales was held on two days, on 22nd and 23rd January, 1968. On 10th March, 1969 the defendant filed E.A. No. 157 of 1969 under Order 21, rule 90, Civil Procedure Code, for setting aside the sale. Notwithstanding this the sale was confirmed. E.A. No. 157 of 1969 was dismissed by the Executing Court. On appeal by the defendant to the High Court,

Held: By advancing the hearing without an application by any of the parties considerable prejudice had been caused to the judgment-debtor, who had no opportunity to be present at the Court, when the proclamation of sale was ordered on 22nd January, 1968. The prejudice had been caused to the defendant-judgmentdebtor as he could not give his valuation at the time of the settlement of the sale proclamation and the sale had gone on without such valuation having been shown in the sale proclamation. The executing Court had acted in quite an arbitrary and improper manner in advancing the hearing *suo motu* without a request from any of the parties. It was a clear case of abuse of the process of Court. [*Para.* 7.]

The decree sought to be executed was for more than Rs. 1,30,000 and even in the execution petition the value of the properties brought to sale was stated as Rs. 1,00,000. In a matter involving such heavy stakes the Court should not have adopted the improper method of advancing the hearing of the execution petition without proper notice to the parties and directing the proclamation and sale in the absence of the judgment-debtor. The way in which the execution petition had been rushed through and the order for proclamation and sale obtained behind the back of the judgment-debtor leads to the suspicion that the advancement of the hearing and the ultimate order for proclamation of sale behind the back of the judgment-debtor could have been done at the instance of the decree-holder. The Court also appears to have played into the hands of the decree-holder. [*Para.* 7.]

There had been an irregularity in the settlement of the sale proclamation and also in the conduct of the sale. On this ground alone the sale was liable to be set aside. [*Para.* 9.]

Appeal against the order of the Sub-Court, Madurai. dated 16th August. 1976 in E.A. No. 187 of 1969 in E.P. No. 119 of 1967 in O.S. No. 166 of 1975.

S. Desikan, for Appellant.

C. N. Natarajan and *C. M. Sivakumar,* for Respondent.

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*A.A.O. No. 532 of 1977.
5th March, 1981.

The Court delivered the following

JUDGMENT.—This appeal arises out of an order passed by the Court below dismissing an application for setting aside the Court-auction-sale, filed under Order 21, rule 90, Civil Procedure Code, by the judgment-debtor who is the appellant herein.

2. The appellant herein had executed a mortgage of two items of his properties in the year 1963. A suit was filed on the said mortgage in O.S. No. 166 of 1965 in the year 1965. There was a preliminary decree passed in that suit on 29th June, 1966 for Rs. 1,23,088.58 with subsequent interest thereon. Later, on 28th February, 1967, a final decree had been passed. An execution petition was filed in E.P. No. 119 of 1967 in August, 1967, for realising the decree amount by sale of the hypotheca. The said execution petition was originally filed by the decree-holder in O.S. No. 166 of 1965. As the decree-holder died later, his legal representatives were brought on record on 30th November, 1967, and on that day the execution petition was posted to 22nd December, 1967. However, it appears that the execution petition was advanced and taken up on 1st December, 1967, and notice was directed to be issued for 2nd December, 1967. On 2nd December, 1967, neither the defendant, nor his counsel appeared and the Court had directed the sale of the properties to be held on 22nd January, 1968. Accordingly the sale was held on two days on 22nd January, 1968 and to 23rd January, 1968 and item 1 has been sold in favour of the 7th defendant for a sum of Rs. 40,000 and item 2 has been sold in favour of the 6th defendant for a sum of Rs. 73,500. On 10th March, 1969, the defendant filed E.A. No. 157 of 1969 under Order 21, rule 90, Civil Procedure Code, for setting aside the sale. But, notwithstanding the filing of that application for setting aside, the executing Court confirmed the sale. Later, the defendant filed E.A. No. 180 of 1969 for approval of the security furnished by a third party on his behalf. Since the title deeds have not been produced as directed within time, the said application was rejected. Thereafter, the appellant filed E.A. No. 716 of 1969, for restoring E.A. No. 157 of 1969 for setting aside the sale. That was dismissed for default on 12th September, 1969. Thereafter the appellant filed C.M.A. No. 307 of 1971 before this Court and that was allowed. The result was that E.A. No. 157 of 1969 was restored to file by the Court below.

3. The stand taken by the defendant-judgment-debtor before the Court below was that respondents 6 and 7 who had purchased items 2 and 1 respectively are close relations of the decree-holder and therefore, the purchases should be taken to be by the decree-holder himself without obtaining leave to bid. At the time the appellant filed the application for setting aside the sale, he was an undischarged insolvent and therefore, the entire estate was in charge of the 5th respondent, the Official Receiver. He more or less supported the case of the appellant in his application for setting aside the sale. The stand taken by the Official Receiver before the executing Court was that if the sale is set aside and the properties are sold by him after sufficient proclamation, the properties will certainly fetch a very good price.

4. Respondents 2 and 3 who are legal representatives of the original decree-holder had taken the stand before the executing Court that there was no irregularity in the conduct of the sale held on 22nd January, 1968, and 23rd January, 1968, that the judgment-debtor was not present at the time when the sale was held, that there were only a few bidders and they were not inclined to bid for higher amounts than offered by the auction-purchasers and that there has been due publicity and the properties have been properly valued and as the judgment-debtor was not even present on the date of sale, his petition is liable to be dismissed. The 7th respondent adopted the stand taken by the respondents 2 and 3. The 6th respondent who is the purchaser of item 2, contended before the executing Court that there was no irregularity or fraud in publishing or conducting the sale and that he has purchased the property for his own benefit and not on behalf of anyone else and that the price paid by him was reasonable and proper. The fourth respondent is a subsequent mortgagee of the suit properties and he did not file any counter-statement.

5. On a consideration of the claims put forward by the parties, the executing Court

held that there was no irregularity in the conduct of the sale and dismissed E.A. No. 157 of 1969, for setting aside the sale under Order 21, rule 90. As against the dismissal, the present appeal has been filed.

6. In this appeal, the learned counsel for the appellant reiterates the same contentions as were urged before the executing Court. The appellant also contends that the executing Court erred in advancing the execution petition without notice to the defendant and ordering the sale of the properties without giving an opportunity to the defendant to put forward his case as regards the value of the properties which are sought to be sold. The appellant also contends that both the items of properties have been sold for a very low price and that is only due to lack of due publicity.

7. The following three questions arise for consideration in this appeal—

1. Whether there was any irregularity in the settlement and publication of the sale proclamation and the conduct of the sale?

2. Whether the judgment-debtor's valuation of the properties was not set out in the sale proclamation as required under Order 21, rule 66 (2)? and

3. Whether the sale was for a fair and reasonable price?

As already stated, while dealing with the facts, after certain adjournments, the execution petition was posted for 30th November, 1967. On that day, the execution petition was posted for disposal on 22nd December, 1967. However, the E.P. papers contain an entry on 1st December, 1967 'hearing advanced to 2nd December, 1967'. On 2nd December, 1967, the matter was again adjourned to 4th December, 1967, and the order passed on that day was as follows:—

> "Call on 4th December, 1967 and inform Mr. K.S."

On 4th December, 1967, the office noted:—

> "Notice of advancement of hearing given to Sri. K. Sarangapani for R-1 and to Mr. S. Palanisami for R-2, on 2nd December, 1967 and G.R."

and the Judge has passed the following order:

> "Defendant absent. Proclamation and sale on 22-1. Further hearing 23-1"

From the above orders passed by the executing Court, on various dates, it is seen that the defendant was not present either on 1st December, 1967 or on 2nd December, 1967 or on 4th December, 1967, when the final order directing proclamation and sale of the properties was passed by the Court below. The absence of the defendant was due to the fact that the execution petition which was originally posted to 22nd December, 1967, had been advanced to 1st December, 1967, without notice to the judgment-debtor or his counsel and orders had been passed in the absence of the defendant or his counsel. As already stated, in this case, the execution petition was originally posted to 30th November, 1967, and on that day the matter was further adjourned to 22nd December, 1967. Normally the defendant and his counsel would have expected the matter to be heard on 22nd December, 1967, the date fixed for the next hearing by the Court. It is the admitted case of the parties before me that no application was filed by anyone for advancing the hearing of the execution petition. Even the endorsements in the execution petition do not indicate that any of the parties filed an application for advancement of the hearing of the execution petition from 22nd December, 1967 to an earlier date. We do not know under what circumstances, the Court has chosen to advance the hearing of the execution petition. On 30th November, 1967, the Court has chosen to adjourn the matter to 22nd December, 1967, and there is no reason as to why the Court should *suo motu* take up the matter on 1st December, 1967, and advance the hearing of the execution petition to 2nd December, 1967. The order passed on 1st December, 1967, advancing the hearing does not give any reason as to why it was so advanced and at whose instance. By advancing the hearing without an application by any of the parties considerable prejudice has been caused to the judgment-debtor who had no opportunity to be present at the Court when the proclamation of sale was ordered on 22nd January, 1968. The prejudice has been caused to the defendant-judgment-debtor as he could not give his

valuation at the time of the settlement of the sale proclamation and the sale has gone on without the judgment-debtor's valuation having been shown in the sale proclamation. Apart from the prejudice that has been caused to the judgment-debtor in that he had no opportunity to have his valuation set down in the sale proclamation, the executing Court has acted in quite an arbitrary and improper manner in advancing the hearing *suo motu* without a request from any of the parties. It is a clear case of abuse of the process of Court. Having adjourned the matter to 22nd December, 1967, the executing Court again took it up in the absence of the parties on 1st December, 1967 and advanced the same to 2nd December, 1967, without due notice to the parties concerned. As a matter of fact, on the adjourned date, 2nd December, 1967, the matter was called and the counsel for the judgment-debtor was not present. So the Court makes an order—

> "Call on 4th December, 1967, and inform Mr. K.S. (K. Sarangapani for R-1, the judgment-debtor)."

There is no evidence that in between 2nd December, 1967 and 4th December, 1967, Mr. Sarangapani, counsel for the judgment-debtor, was in fact served, though the office note says that notice of advancement of hearing was given to Mr. K. Sarangapani for R-1 and to Mr. S. Palanisami, for R-2, on 2nd December, 1967 and to Official Receiver. But the case records do not contain the proof of service of the notice of advancement of hearing on Mr. Sarangapani, the counsel for the judgment-debtor. The absence of the judgment-debtor or his counsel on 4th December, 1967 would indicate that notice might not have been served for advancing the hearing of the execution petition. In this case, the decree sought to be executed is for a heavy sum of more than Rs. 1,30,000, and even in the execution petition the properties which are brought to sale have been valued at Rs. 1,00,000. In a matter involving such heavy stakes the Court should not have adopted such an improper method of advancing the hearing of the execution petition without proper notice to the parties and directing the proclamation and sale in the absence of the judgment-debtor. The way in which the execution petition has been rushed through and the order for proclamation of sale has been obtained behind the back of the judgment-debtor, leads to the suspicion that the advancement of the hearing and the ultimate order for proclamation of sale behind the back of the judgment-debtor could have been done at the instance of the decree-holder. The Court also appears to have been played into the hands of the decree-holder.

8. Apart from the above circumstances, the counter filed by respondents 2 and 3 before the executing Court clearly indicates that there was no proper publication. They have admitted that there were only few bidders and even they were not inclined to bid for higher amounts than offered by the two auction-purchasers. If there are only a few bidders and if there is no competitive bidding on 4th December, 1967, the sale could have been adjourned to a future date so that there will be competitive bidders.

9. I am therefore, of the view that there has been an irregularity in the settlement of the sale proclamation and also in the conduct of the sale. On this ground alone the sale is liable to be set aside. It is, therefore, unnecessary to go into the question as to whether the price for which the properties were auctioned is lower than the market rate.

10. The result is the appeal is allowed with costs; and the application for setting aside the sale under Order 21, rule 90, Civil Procedure Code will stand allowed with costs.

S.J. ——— *Appeal allowed.*

[END OF VOLUME (1982) 1 M. L. J. REPORTS.]